



In the Matter of:

**ROGER A. LUDER,**

**ARB CASE NO. 13-009**

**COMPLAINANT,**

**ALJ CASE NO. 2008-AIR-009**

**v.**

**DATE: November 3, 2014**

**CONTINENTAL AIRLINES, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Howard T. Dulmage, Esq.; Law Offices of Howard T. Dulmage, PLLC; Houston, Texas**

*For the Respondent:*

**Donn C. Meindertsma, Esq.; Conner & Winters, LLP; Washington, District of Columbia**

**Before: E. Cooper Brown, Deputy Chief Administrative Appeals Judge; Luis A. Corchado, Administrative Appeals Judge; Lisa Wilson Edwards, Administrative Appeals Judge. Judge Corchado, dissenting.**

### **FINAL DECISION AND ORDER**

This case arises under the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121 (Thomson/West 2007) (AIR 21 or Act), and implementing regulations, 29 C.F.R. Part 1979 (2013). Complainant Roger Luder filed a complaint with the Occupational Safety and Health Administration (OSHA) on January 3, 2008, alleging that his employer, Respondent Continental Airlines, Inc. (Continental or the Company), retaliated against him after he complained about an air safety issue, in violation of the Act. On November 6, 2009, after a hearing, a Department of Labor Administrative Law Judge (ALJ) entered a decision determining that Continental violated the

Act, and ordered relief that included compensatory damages. *Luder v. Continental Airlines*, ALJ No. 2008-AIR-009 (Nov. 6, 2009)(D. & O.). Continental petitioned the Administrative Review Board (ARB) for review. On January 31, 2012, the ARB affirmed the ALJ's determination that Continental violated the Act, but remanded the case for further consideration of the compensatory damages award. *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 13 (ARB Jan. 31, 2012)(ARB Remand Order). After further proceedings on remand, the ALJ entered an order on October 22, 2012, awarding Luder compensatory damages that included payment of a monthly award from December 13, 2007, until July 1, 2016, when Luder reaches the Company's mandatory retirement age of 65. *Luder v. Continental Airlines, Inc.*, ALJ No. 2008-AIR-2009 (Oct. 2, 2012) (D. & O. on Rem.). Continental again petitions ARB for review. We affirm, modifying the relief awarded.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under AIR 21 and implementing regulations. Secretary's Order 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012). *See also* 29 C.F.R. § 1979.110. The ARB reviews the ALJ's factual findings for substantial evidence, 29 C.F.R. § 1979.110(b), and conclusions of law de novo, *Rooks v. Planet Airways*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

### **BACKGROUND**

The pertinent facts are fully set out in the ALJ's prior decisions. *See Luder v. Continental Airlines, Inc.*, ALJ No. 2008-AIR-009 (Nov. 6, 2009); *Luder v. Continental Airlines, Inc.*, ALJ No. 2008-AIR-2009 (Oct. 2, 2012).

#### ***A. Prior proceedings***

On November 6, 2009, after an evidentiary hearing on the merits, the ALJ entered a Recommended Decision and Order determining that Luder engaged in protected activity when he refused to fly a plane that he believed may have been damaged due to turbulence on September 15, 2007. D. & O. at 34-35. The ALJ found that Luder's protected activity contributed to Continental's imposition of a four-day suspension and 18-month termination warning letter, and that these adverse actions by the Company violated the Act. *Id.* at 36. Luder stopped flying for Continental on November 10, 2007. D. & O. on Rem. at 13. The ALJ ordered relief that included, inter alia, compensatory damages in the form of a monthly pay award to Luder based on the following:

I am convinced by Complainant, Whatley, and Dr. Shaulov's credible testimon[y] that Complainant experienced such anxiety

following the September 15, 2007 incident, followed by the October 12, 2007 investigatory meeting, and subsequent disciplining, that he was not able to successfully complete his simulator training and suffered thereafter with disabling PTSD, depression, and anxiety, causing him to be unable to fly. As a result, Claimant has experienced a 50% loss of income. This loss of income has apparently forced Complainant to sell a condo []. Accordingly, Respondent will make Complainant whole by paying Complainant his monthly salary, plus interest, commencing when he ceased to fly because of the PTSD, to present and continuing, until he has sufficiently recovered from the PTSD to continue flying or to perform other suitable alternative employment.

D. & O. at 41.

On January 31, 2012, the ARB issued a Decision and Order of Remand, affirming the ALJ's liability determination, and a portion of the relief. ARB Remand Order at 13.<sup>1</sup> The ARB remanded for further consideration of compensatory damages, including Luder's entitlement to a monthly pay award for lost wages occurring after November 10, 2007, due to the ALJ's "fail[ure] to provide sufficient reasons and basis for the . . . Award." *Id.* at 13, 21. The ARB determined that there were "material conflicts and ambiguities in the evidentiary record regarding medical causation as well as ambiguity in the ALJ's findings related to the debilitating impact, if any, of the suspension, the 18-month warning letter, and the November 2007 line check and simulator test" and that "[w]ithout resolution of these issues, the ALJ's Monthly Pay Award cannot be reviewed on appeal." *Id.* at 14. In remanding to the ALJ, the ARB stated that complainant "must show by a preponderance of the evidence that the unfavorable personnel action caused the harm" or that the "unlawful conduct aggravated a preexisting psychiatric condition." *Id.* at 16 (internal quotations and citation omitted). A "lack of specificity in the ALJ's analysis, with findings of material fact lacking at times and in other instances failing to establish the evidentiary basis for findings the ALJ made, place[d] the Board in the untenable position of not being able to fulfill" its "agency appellate review function." *Id.* at 18-19.

On remand, the ALJ entered an order on March 26, 2012, directing the parties to brief and submit additional evidence on medical causation and damages. On May 1, 2012, the Company moved to exclude additional evidence. The ALJ granted the Company's motion on May 2, 2012 (holding that "no additional evidence will be submitted or considered and no further discovery will be conducted on this matter."). On May 23, 2012, the ALJ vacated the prior May 2, 2012 order, and entered an order "allowing submission of additional evidence." ALJ Order

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<sup>1</sup> The ARB affirmed the ALJ's relief to Luder that included reimbursement of lost income from the trip that Luder was not permitted to fly due to the suspension (\$3,418.26), plus interest on those wages, expungement of Luder's record of the 18-month termination warning. ARB Remand Order at 21. The ARB was silent on the ALJ's order awarding reimbursement for any lost benefits Luder may have suffered; that issue is addressed in this Final Decision and Order on Remand, *infra* at 12-13.

Allowing Submission of Additional Evidence (issued May 23, 2012) (stating “ARB left it to the undersigned’s discretion upon remand to determine how to address the issue of medical causation and front pay award in further proceedings.”).

### ***B. ALJ’s Recommended Decision and Order on Remand***

The ALJ entered a Recommended Decision and Order on Remand, determining that Luder proved that the adverse action he suffered caused his psychiatric condition that prevented him from returning to work. The ALJ found that the evidentiary record shows that Luder exhibited “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.” D. & O. on Rem. at 3. The ALJ found “ample support for causation of Complainant’s psychiatric and physical problems by Respondent when it retaliated against Luder . . . regardless of the psychiatric diagnoses, when the entire record, including the credible testimony of Dr. Shaulov, Dr. Jorgenson, and Luder, is considered.” *Id.* at 4-5. The ALJ stated that Dr. Shaulov evaluated Luder at appointments held between January 3, 2008, and September 21, 2011, and concluded that Luder’s 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.” *Id.* at 3 (citing Shaulov Declaration (Dec.) (dated Apr. 23, 2012)). The ALJ also noted Dr. Jorgenson’s evaluation, as Luder’s treating psychologist, that although not diagnosing Luder with PTSD, “recogniz[ing] that [Luder] was suffering from major depression anxiety disorder, all symptoms of post-traumatic stress.” *Id.* at 3 (citing Complainant’s Exhibit (CX) 4 at 7). The ALJ further observed the notes of Dr. Elliot, who evaluated Luder at Continental’s request. The ALJ stated that Dr. Elliot “confirm[ed] 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.” *Id.* at 3 (citing CX-4 at 00229). The ALJ determined 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.” D. & O. on Rem. at 4. “However, closely following the adverse action Luder experienced deteriorating symptoms, which is an important consideration in determining causation.” *Id.*

The ALJ further determined that, following the retaliation he suffered, Luder was not qualified for reinstatement to pilot. The ALJ stated that “Luder continued to experience tachycardia for which he must be symptom free for 90 days before being allowed to take and pass his flight physical.” *Id.* The ALJ further observed that the Company had not arranged for Luder to take the psychiatric portions of this test, and that on February 3, 2012, the U.S. Department of Transportation denied Luder his First Class Medical certificate. *Id.* The ALJ stated that FAA regulations require Luder to “report all physical and mental problems which would interfere with his safe operation of an aircraft.” *Id.* Finally, the ALJ found that “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.” *Id.* The ALJ found that the Company “has not offered him and in all probability will not offer him any other

suitable alternative employment.” *Id.* The ALJ noted that “[w]hile Luder has done little to search for work, [the Company] has failed to show what, if any, work he is qualified for.” *Id.*

Based on these findings, the ALJ concluded that Luder “cannot or will not be reinstated and instead must rely on front pay as a remedy.” *Id.* at 5. The ALJ ordered that

[Luder] 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 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.

*Id.* at 5.<sup>2</sup>

## DISCUSSION

### ***A. The ALJ acted within his discretion in reopening the record for supplemental evidence on remand***

Continental argues (Br. at 4) that the ALJ erred in reopening the case for additional evidence. We remanded this case to the ALJ “for further consideration of Luder’s entitlement to a monetary award for lost wages occurring after November 10, 2007.” ARB Remand Order at 21. In that order, we observed that the ALJ’s broad discretion for conducting further proceedings did not foreclose the ALJ from reopening the record for additional evidence on medical causation. The ARB Remand Order states:

Remand is dictated to provide the ALJ the opportunity to clarify the basis for the Monthly Pay Award, which necessarily will require addressing the issue of medical causation and the amount of damages, if any, connected to Luder’s long-term disability. Given what we hope by this decision is a clarification of the law with respect to establishing when medical evidence may be

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<sup>2</sup> The ALJ ordered Continental to pay Luder any loss of benefits for the time periods specified in the front pay award, and fund Luder’s retirement account at a rate of 12.75% of his pay for the period from December 13, 2007, to July 1, 2016, and reimbursement of any additional COBRA payments he paid after his discharge. The ALJ also ordered the company to issue Luder and his dependents a travel pass in accordance with the airline’s Pass Travel policy. D. & O. on Rem. at 5-6.

necessary to prove causation in the range of emotional distress cases (some of which stem from specific medical conditions), arising under AIR 21, it is left to the ALJ's discretion upon remand to determine, consistent with this opinion, how to address this issue in further proceedings.

*Id.* at 20.

The ALJ regulation governing reopening of the record states: "When there is a hearing, the record shall be closed at the conclusion of the hearing *unless the administrative law judge directs otherwise.*" 29 C.F.R. § 18.54(a) (emphasis added). By the remand order, the ARB acknowledges that Section 18.54(a) affords the ALJ discretion to reopen the record on remand. Indeed, the ARB Remand Order gave the ALJ "discretion to determine the fairest and most expeditious way to proceed consistent with this opinion." ARB Remand Order at 21. Consistent with the ARB's directive, the ALJ properly exercised discretion and reopened the record for the parties to "supply additional evidence of those issues raised upon [by] the Board." *Id.* at 2. The ALJ's reopening of the record on remand is consistent with that taken in other administrative cases. See *Zinn v. Commercial Lines*, ARB No. 13-021, ALJ No. 2009-SOX-025, slip op. at 4 (ARB Dec. 17, 2013) (holding that "the ALJ was well within his discretion to reopen the record on remand for the submission of additional pertinent evidence that was relevant to the issues raised in the ARB's remand order."); see also *Michaud v. BSP Transp., Inc.*, ALJ No. 1995-STA-029 (ALJ June 12, 1997) (Recommended Decision and Order on Remand) ("It is clear that every remand mandate should be strictly followed within the confines of the mandate order. See *Tritt v. Fluor Constructors, Inc.*, No. 1988-ERA-029 (ALJ Aug. 29, 1994). It is equally clear, however, that where a remand mandate is issued with directions to accomplish a certain act, but without indicating how the act shall be performed, there exists a large measure of discretion in the performance of the act.").

Given the ARB's directive in the Remand Order, the ALJ was well within his discretion to reopen the record for the submission of supplemental evidence.<sup>3</sup>

***B. Substantial evidence supports the ALJ's determination that the Company's retaliatory actions caused Luder's mental decline***

An award of "compensatory damages based on the complainant's mental suffering or emotional distress" requires that the complainant "show by a preponderance of the evidence that the unfavorable personnel action caused the harm." ARB Remand Order at 16 (quoting *Rooks*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 10 (ARB June 29, 2006)). See also *Hagman v. Washington Mutual Bank, Inc.*, ALJ No. 2005-SOX-073 (Dec. 19, 2006). On

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<sup>3</sup> Moreover, the Company was not prejudiced by the ALJ's decision to reopen the record. The ALJ permitted the submission of additional evidence by *both parties*. See ALJ Order Allowing Submission of Additional Evidence at 1. On September 7, 2012, the Company filed with the ALJ a Notice of Filing of Additional Evidence on Remand. See Respondent's Notice (filed Sept. 7, 2012).

remand, the ALJ admitted additional evidence into the record, including “declarations and deposition testimony of Dr Vitaliy Shaulov . . . and . . . psychologist Sandra Jorgensen” and additional medical records proffered by Luder and Continental. D. & O. on Rem. at 2. On review of the evidentiary record, the ALJ found “ample support for causation of Complainant’s psychiatric and physical problems by Respondent when it retaliated against Luder . . . regardless of the psychiatric diagnosis, when the entire record, including the credible testimony of Dr. Shaulov, Dr. Jorgenson, and Luder, is considered.” *Id.* at 4-5. Substantial evidence supports that determination.<sup>4</sup>

***1. Dr. Shaulov opined that the cause of Luder’s mental decline was the retaliation he suffered at work***

On remand, the ALJ permitted the submission of supplemental evidence including a declaration (dated April 23, 2012) and deposition (dated July 13, 2012) of Vitaliy Shaulov, M.D. Luder’s psychiatric care with Dr. Shaulov began on January 3, 2008, and ended on September 21, 2011. Shaulov Dec. at 1, 3. Dr. Shaulov opines that the company’s retaliation against Luder caused his psychiatric and physical decline. Shaulov Dec. at 4, ¶ 9.

Dr. Shaulov testified in a declaration 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 through severe turbulence. Of note, Mr. Luder also experienced tachycardia for the first time in his life after these events.” Shaulov Dec. at 4. Dr. Shaulov stated that Luder’s physical symptom, the tachycardia (racing heartbeat), is of “big significance in terms of the objectivity of the trauma.” Shaulov Deposition (Dep.) at 56. Dr. Shaulov stated that the tachycardia that Luder suffered is “an emotional response to trauma to a degree of where the internal organs are also involved or automatic nervous system where the heart rate is involved. It means the whole body reacts to that which is, again, it’s more – it shows the significance of the event.” Shaulov Dep. at 57. Dr. Shaulov testified extensively on the basis for his conclusion that Luder’s mental condition was “caused by his reaction to the treatment he received by Continental officials.” Shaulov Dec. at 4. Dr. Shaulov testified in a July 13, 2012, deposition:

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<sup>4</sup> The Company did not proffer any independent medical evidence to directly refute the opinions of Dr. Shaulov and Dr. Jorgenson that Luder’s mental condition was caused by the Company’s retaliatory acts. *See, e.g., Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 1995-STA-029 (ARB Oct. 9, 1997) (ARB stating that “[I]ike the ALJ, we find that the evidence establishes that BSP’s discriminatory action was a proximate cause of Michaud’s depression. The testimony and reports of Michaud’s treating physician and the licensed social worker who provided therapy, and the written report of a consulting psychiatrist, all agree that Michaud suffers from major depression as a result of BSP’s unlawful discharge. . . . BSP submitted no evidence to rebut this evidence of causation.”). Moreover, the opinion of Dr. Elliot, the psychologist retained by Continental early on to evaluate Luder, supports the opinions of Dr. Shaulov and Dr. Jorgenson that the initiating events of Luder’s refusal to accept an aircraft on September 15, 2007, and the Company’s disciplinary actions that followed, caused Luder’s symptoms. *See infra* at 10.

A: As I explained, it's been said before, so he didn't have any history of mental illness or abnormality, mental abnormality prior to what happened. And then after this, he starts having these symptoms of depression, anxiety, even paranoia, some signs like tachycardia. His certain personal habits deteriorated, like his personal hygiene, the way he was dressed. He started neglecting himself. His mood became very unstable, and he starts having his mood fluctuate to a degree from hypermanic to severely depressed. He starts having suicidal, kind of passive suicidal thoughts without plans or anything. But kidding himself, he stopped caring about life, so it was sort of a significant change. So after that happened, so I consider it's a milestone. It's a causative event after which basically his decline started.

Q: Right. So it's a matter of timing that something happened?

A: Yeah, time related, correct.

\* \* \*

A: But basically as far as I knew, at that time he was symptom-free up to that point and then suddenly started to experience the psychological/psychiatric symptoms.

Q: Well, you make a good point: You don't know what his condition really was?

A: No. No. It could be started prior to that. And nobody just saw him before, no psychiatrist or anybody, so we don't know. I just assume from his words basically and from what I know and the fact that he still was functioning as a pilot, that he was not having significantly psychiatric symptoms.

Shaulov Dec. at 58-59.<sup>5</sup>

Dr. Shaulov stated that Luder believed that Continental accused him of "something unfairly", and that this treatment by the Company was traumatizing for him. *Id.* at 14. In response to a deposition question whether it was significant that Luder felt he was almost fired, Dr. Shaulov explained:

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<sup>5</sup> Dr. Shaulov testified that other family issues were not related to his mental decline. Dr. Shaulov testified (Shaulov Dec. at 60):

A: So there are many people whose psychiatric whatever deterioration related to the family or situation. And at least my impression that it was not the case with him. At least at the beginning. I didn't see anything related, and he never – he never focused on that.



Q: Was it significant to you professionally that he [Luder] felt he was almost fired?

A: Yes.

Q: Why?

A: It was significant because if he was accused of something unfairly, not objectively, you know, of doing something, and then almost fired for that, it was kind of psychological, you know, trauma. I don't know what degree would be, but it's serious.

Q: Do you have other patients who have had trauma from being terminated from their jobs?

A: Yes, I do.

Q: Is that a common thing you see?

A: It is common thing because on how the environment to find another job and people, the financial obligation we all have now, it's basically changed the whole life of a person. It's very serious.

*Id.* at 14-15.

Dr. Shaulov testified about his initial evaluation of Luder on January 1, 2008. At that appointment, Dr. Shaulov questioned Luder as to his feelings about his profession and working for the Company. Dr. Shaulov stated while Luder “still believed in himself and who he was and his professionalism and his level of confidence in terms of as a professional . . . the way he was treated by the airline official made him very anxious, very uncomfortable.” *Id.* at 14-16. Dr. Shaulov stated that Luder “was very attached to his profession, and basically he felt like all his career, all his life is done, finished at that point.” *Id.* at 16. Dr. Shaulov testified, based on the Initial Psychiatric Evaluation (dated Jan. 3, 2008), that Luder was angry, depressed, and anxious. See CX-3 at 00194. Dr. Shaulov stated that this assessment was based on the way Luder “spoke, by the way he became very emotional when he talked about being almost fired and about his conflict about being vindicated for, about injustice.” Shaulov Dep. at 17. By Luder’s third appointment with Dr. Shaulov on February 7, 2008, Luder began displaying hygiene that Dr. Shaulov commented as “insufficient.” See CX 3 at 00189 (Progress Note (dated Feb. 7, 2008)). Dr. Shaulov testified that when he first examined Luder in January 2008, Luder was “meticulous,” and “looked like an airline pilot.” Shaulov Dep. at 27. Dr. Shaulov testified that he was “hoping to see some improvement” in Luder since the January 2008 appointment, but in the February 7, 2008, Progress Note, Dr. Shaulov states that Luder “continues having anxiety attacks particularly thinking about his broken career” and that Luder is “[s]till depressed most of the time.” *Id.* at 28-29.

Dr. Shaulov testified that by December 2009, Luder began having nightmares about losing his pilot’s license. *Id.* at 43. In addition, Dr. Shaulov testified that during the course of the appointments, Luder had discussed going through the simulator and that this event was a “traumatic, at least for him, experience.” *Id.* at 39; see also CX 3 Progress Note (dated May 26, 2009). Dr. Shaulov testified about the possibility of Luder fully recovering, stating:

A: because his condition, to my understanding, was induced by certain stressors. . . . You can name it PTSD or depression or panic disorder. It doesn't matter. But there was some sort of trigger by situation that – my understanding is if that situation is eliminated or gone, his mental condition can easily improve without any other interventions.

Shaulov Dep. at 68.

***2. Dr. Jorgensen opined that the cause of Luder's mental decline was the retaliation he suffered at work***

On remand, the ALJ admitted supplemental evidence that included a deposition by Sandra Jorgenson, Ph.D. (Jorgenson Dep. (dated July 12, 2010)). Dr. Jorgenson is a psychologist, and treated Luder in 22 sessions from August 2008 (nine months after Luder's sick leave ended with the Company) to March 2009. CX, Jorgenson Letter dated April 1, 2009; see also Jorgenson Dep. at 25. Dr. Jorgenson stated that throughout the period of time that she worked with Luder, he was "someone in high distress, very agitated . . . hypervigilant, [and] quite paranoid." Jorgenson Dep. at 14-15. Jorgenson clarified the term "hypervigilant" as a person who is "[o]n guard, not in a way feeling safe in the world, feeling an attack could come in some direction." *Id.* at 15. Dr. Jorgenson testified that the traumatic event that triggered Luder's psychiatric condition was the retaliation he experience working for the Company. She stated:

Q: What was the traumatic event?

A: Well, it started with his being grounded and not able to fly with the simulator test that he apparently failed, and the impact of that, as I understood it, as he stated, was his inability to get another position as a pilot with another airline. So something that was apparently extremely important to him that he had wanted for – since his childhood and was very much a part of his identity was suddenly taken away from him.

*Id.* at 17. Dr. Jorgenson stated that Luder's inability to fly "took away the majority of his identity and his purpose in the world as he saw it." *Id.* at 18; see also *id.* at 19 ("His focus was so intently on what was going on with the airline and his career."). Dr. Jorgenson stated further that Luder has been unable to put the incident behind him and move forward with his life. *Id.* at 20, 22. Dr. Jorgenson testified that the nature of Luder's circumstances may have prevented him from recovering from his termination. She stated:

A: What I find – and, again, I keep saying this. What I find the difficulty is, the event never ended. You can do that with somebody that comes in who has the traumatic event in the past,

and other people that have come into their lives that had no relationship with that. But he kept encountering the people the very people that at the beginning sanctioned him and I suppose, failed the simulator test.

*Id.* at 37-38. Dr. Jorgensen concluded that Luder's negative feelings were caused by his experiences at work, stating: "It was more of how he was depicting his circumstances and how he was feeling about what happened against him. Komidor used – and I think there were several other men, too. And whoever was the one who treated him in the flight simulator test, I don't remember his name at all, but feeling that they were against him or they were told to be against him in some way." *Id.* at 57.

### ***3. Early medical records show that Luder attributed the onset of his mental decline to the Company's retaliation***

A Neuropsychological Evaluation conducted by Dr. Robert Elliott, at the Company's request, identifies as the "Initiating Incident" for Luder's psychological symptoms, the retaliatory events involving the Company and his refusal to fly in September 2007. CX at 00222-00224. The Evaluation states that prior to these incidents with the Company, Luder "had only one experience with the mental health community[;] [i]n 1988 he was ordered to participate in family counseling for three sessions during divorce proceedings." CX at 00222 (Neuropsychological Evaluation by Robert Elliott, Ph.D. dated June 24, 2008).<sup>6</sup>

Substantial evidence thus fully supports the ALJ's determination that the Company's retaliatory actions caused Luder's mental decline (which includes medical evidence that Luder suffered from severe anxiety, attack accompanied by tachycardia, insomnia, depression, diarrhea, mood instability, and occasional signs of hypermania).

### ***C. The parameters of Luder's monthly pay award and other relief***

The ARB directed that if, on remand, the ALJ found that Luder's condition was causally related to the retaliation he suffered, that the ALJ clarify the basis for and parameters of any resulting award of monthly pay or other relief awarded. ARB Remand Order at 20-21. In

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<sup>6</sup> Luder completed an Employee Statement on December 19, 2007, in which he stated as the cause of his injury the following: "I was placed under interrogation by the Chief Pilot's Office prior to a simulator check-ride. I believe the simulator check-ride was purposely made unmanageable due to retaliation against me by Continental management." CX at 00226 (Elliot Evaluation quoting from Employment Statement dated Dec. 19, 2007). After this simulator incident, Luder states that he began suffering from "[l]ack of sleep, lack of confidence, low self-esteem, fear, worry for future, anxiety, panic attacks, tachycardia, fear of having a heart attack, hyperventilation, lightheadedness, stomach turmoil and diarrhea." CX at 00182 (Letter from Dr. Michael Haberman to Michael Young dated Apr. 14, 2008); see also 00199 (Letter from Michael Young to Dr. Michael Haberman dated Feb. 20, 2008).

accordance with that directive, the ALJ ordered that Luder receive a Monthly Pay Award from December 2007 (when Luder stopped working) to July 1, 2016 (when he reaches the mandatory retirement age of 65). This was error. The undisputed medical evidence shows that Luder's psychiatric/psychological treatments ended by September 21, 2011, and there is no medical evidence that Luder suffers from psychiatric or psychological condition beyond the conclusion of his treatment that would prevent him from returning to work.

As the ALJ found, after the Company's retaliatory actions, Dr. Shaulov and Dr. Jorgenson treated Luder for his mental condition. The undisputed medical evidence shows that Luder's psychiatric treatments with Dr. Shaulov ended on September 21, 2011, and his psychological treatments with Dr. Jorgenson ended earlier, in March 2010. Shaulov Dec. at 1, 3; CX, Jorgensen Letter dated April 1, 2009; see also Jorgensen Dep. at 25. Both doctors stated that absent the stressors that Luder experienced, his mental condition could improve. Shaulov Dep. at 67-68; Jorgensen Dep. at 62. Moreover, Luder testified in his July 12, 2012, deposition that he was no longer under a psychiatric treatment plan. Luder Dep. at 53. There is also no medical evidence that Luder is under continuing or ongoing treatment for tachycardia, a heart condition that is associated with the psychological problems that Luder had experienced after the retaliation. The record reflects that Luder was most recently evaluated by Dr. Norman Shaia, a cardiologist, on March 22, 2012. App. 29 (RX-R1(201)). Dr. Shaia evaluated Luder and determined that an echocardiogram "demonstrated normal LV systolic function" and "no significant valvular abnormalities." App. 29. Dr. Shaia dismissed Luder from his practice on June 22, 2012 (App. 39 (RX-R1(239))), and Luder fails to show that he is under ongoing evaluation or treatment by any other medical professional.

While the monthly pay award was designed to make Luder whole for the mental problems he suffered stemming from the retaliation by Continental, the relief must be "proportionate to the harm inflicted." *Wallum v. Bell Helicopter Textron, Inc.*, ARB No. 09-081, ALJ No. 2009-AIR-006, slip op. at 3 (ARB Sept. 2, 2011). Because the medical evidence establishes that as of September 21, 2011, Luder's psychiatric treatment with Dr. Shaulov had ended, and there is no evidence of record indicating that beyond that date he has suffered any mental, psychological, or physical condition attributable to the retaliation he suffered, the ALJ erred in awarding monthly pay and other relief beyond that date. Luder's monthly pay award, as well as other relief ordered by the ALJ, is therefore modified as hereafter set forth in the conclusion that follows.

Finally, we note that AIR 21 section 42121(b)(3)(B) provides, "If . . . an order [determining that a violation of AIR 21 has occurred] is issued . . . , the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all cost and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing [of] the complaint upon which the order was issued." Any such request in this case must be filed with the Board on or before thirty (30) days of the date of the Final Decision and Order. Any response to such request must be filed with the Board on or before thirty (30) days of the date on which the request is filed with the Board."

## CONCLUSION

The ALJ's Recommended Decision and Order on Remand (dated Oct. 22, 2012) is **AFFIRMED**, subject to the **MODIFICATIONS** to the ALJ's award of compensatory damages, including the Monthly Pay Award, and other relief ordered:

1. Luder is entitled to, and shall receive, a monthly pay award as a 737 captain from December 13, 2007 (when his sick leave ended) to September 21, 2011 (when his treatment with Dr. Shaulov ended). The monthly income of \$13,383.92 is to be paid for the period of December 13, 2007, until March 1, 2011. Commencing March 1, 2011, through and including September 21, 2011, Luder is entitled to and shall receive a month pay award of \$14,147.32.
2. Respondent shall 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 Luder 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 benefits he would have received from Respondent.
3. Respondent shall fund Luder's retirement account at the rate of 12.75% of his pay for the entire pay period of December 13, 2007, to September 21, 2011, and shall reimburse Luder for any additional COBRA payments he paid as the result of the lack of employment and/or loss of income for the aforementioned period. Furthermore, Respondent shall issue to Luder and his dependents a travel pass in accordance with Respondent's Pass Travel policy.
4. Respondent shall receive a credit for any and all long term disability paid Complainant during the period December 13, 2007, to September 21, 2011. Respondent shall also receive a discount rate of 4% for any lump sum payments made to Complainant before such payment(s) become due.

Finally, by this decision the ARB reaffirms its prior affirmation of the ALJ's order awarding reimbursement of lost income for the period during which Luder was not permitted to fly due to his suspension (\$3,418.26), plus interest thereon, and the ALJ's order expunging the 18-month termination warning from his employment record.

**SO ORDERED.**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**

**E. COOPER BROWN**

## Deputy Chief Administrative Appeals Judge

### **Luis A. Corchado, *Administrative Appeals Judge*, dissenting:**

I dissent because I see no substantial evidence in the record connecting whistleblower retaliation with Luder's lost pay and damages arising after November 10, 2007. We previously remanded this matter for the ALJ to provide specific reasons and bases for his finding of medical causation between Luder's four-day suspension and warning letter and Luder's inability to work after November 10, 2007. While there is new evidence that Luder received more treatment after the last evidentiary hearing, I see no additional evidence, reasons or bases about the question of medical causation that we remanded. The medical evidence is generalized and conclusory and does not address the question of medical causation within in the context of the ALJ's fact findings covering the period from September 15 through November 10, 2007.

The following undisputed facts and/or fact findings frame the precise question of medical causation. As of September 2007, Luder was an experienced pilot and had flown for Continental for twenty-two (22) years. On September 15, 2007, while boarding a plane (aircraft #304) in Miami to fly the plane back to Houston, the previous flight crew allegedly told Luder the plane flew through severe turbulence. Luder was not on the plane when it allegedly flew through severe turbulence. Consequently, Luder requested a turbulence inspection before he took over flying the plane. On October 11, 2007, following an investigatory meeting, Continental issued a disciplinary letter dated October 19, 2007, which (1) imposed an unpaid suspension for a 21-hour trip previously removed from Luder and (2) served as a "Termination Warning level of discipline to remain in effect for 18 months." JTX4. After the October 19, 2007 letter, Luder piloted airplane flights for Continental. In early November 2007, Continental performed a line check ride on a plane that Luder was flying from New York, New York to Houston, Texas, and Luder passed the test. Later, on November 10, 2007, Continental required Luder to take a simulator test that he did not pass and needed retesting the next day. Luder did not return the next day for retesting, causing Continental to disqualify him from flying. Luder was later medically disqualified due to medications he began taking for psychological illnesses. The ALJ found that neither the line test nor the simulator test constituted unlawful retaliation. The ALJ found that the simulator test was not manipulated to cause Luder to fail. These facts establish that Luder was able to fly until he had to take the lawfully required and fairly administered simulator test. In my view, these facts isolate the precise medical causation question as follows: what substantial evidence in the record shows that, instead of the stressor of the lawful and fairly administered line check ride and simulator test, it was the 21-hour suspension and warning letter that caused Luder's long-term disqualification from flying, despite the fact that he was flying real planes days before those tests occurred.

This Board implicitly recognized that, in assessing damages, "a wrongdoer is liable to the person injured in compensatory damages for all of the natural and direct or proximate

consequences of his wrongful act or omission.”<sup>7</sup> The majority opinion does not analyze the concept of proximate cause<sup>8</sup> in deciding whether Luder proved that the unlawful retaliation led to his inability to fly after November 10, 2007, due to disabling psychological illness.<sup>9</sup> A finding of proximate cause must rest on substantial evidence, which means that: (1) the ALJ and/or the parties have identified record evidence for each of the material fact findings related to proximate cause; (2) the supporting evidence logically supports each of those material fact findings; and (3) the logical inferences attributed to those material fact findings are not overwhelmed by the record as a whole or by unresolved factual disputes.<sup>10</sup> In this case, the relevant substantial evidence must consist of medical expert testimony that logically supports the medical conclusion that unlawful retaliation was a substantial factor in causing Luder’s complex and disabling psychological illness. The majority opinion cites no objective standard for evaluating Luder’s medical evidence and points to no record evidence containing an articulated explanation of medical causation.<sup>11</sup>

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<sup>7</sup> *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, ALJ No. 1993-ERA-024, slip op. at 46-47 (Sept. 1, 1994), aff’d, *Creekmore v. ABB Powers Sys. Energy Servs., Inc.*, (Dep. Sec’y Feb. 14, 1996).

<sup>8</sup> *See, e.g.*, Am. Jur. 2d Negligence § 411 (defining proximate cause as “a natural, direct, and continuous sequence between the negligent act and the injury, unbroken by any new and independent cause, that it can reasonably be said that but for the act the injury would not have occurred). Courts have also used “legal cause” and “proximate cause” interchangeably to mean a “substantial factor” in leading to the harm in question. *See* Am. Jur. 2d Negligence § 458.

<sup>9</sup> This is not a case of deciding how much money fairly compensates Luder for suffering unlawful retaliation, which does not necessarily require medical expert testimony. *See, e.g.*, *Creekmore*, slip op. at 12 (Dep. Sec’y Feb. 14, 1996)(While doubting the medical causation evidence related to the alleged heart attack, the Deputy Secretary found enough other evidence of “demonstrated panic, embarrassment, pain, and suffering” to support a \$40,000 compensatory damages award).

<sup>10</sup> *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 4 (ARB Aug. 29, 2014).

<sup>11</sup> I reserve such a discussion for another case or for this case if an appellate court remands this matter for further analysis. Briefly, by way of example only, Rule 702 requires that the opinion of a qualified expert rest on sufficient facts or data that properly applied reliable principles and methods to the facts of the case. To be clear, it would be too onerous to inject into our administrative process the rigorous standards of Federal Rule of Evidence 702 as interpreted in *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993), *Kumho Tires, Inc. v. Carmichael*, 526 U.S. 137 (1999) and their progeny. I see no need for the ALJs to parallel the gatekeeper functions of the federal court judges and make prehearing rulings on the admissibility of expert testimony, particularly where no party objects to the qualifications of an expert. On the other hand, where a medical expert testifies in an administrative hearing about medical causation, perhaps some of the principles of Rule 702 should be adopted to foster objectivity in measuring whether a medical expert provided sufficient testimony

Continental's arguments persuade me that there is no substantial evidence in the record supporting the ALJ's finding of medical causation between the suspension/warning letter and Luder's damages arising after November 10, 2007. First, Continental's brief thoroughly demonstrated that the Luder's experts testified only generally about the "treatment" he received and Luder's psychological decline but provided no specific, medical testimony explaining the link between the two unlawful employment acts and Luder's psychological injury that disabled him for years. I saw no medical testimony explaining how stressors occurring before Luder returned to flying in October 2007 were a proximate cause while stressors occurring afterwards were not. In addition, I saw no medical testimony identifying the medical principles and methods relevant to this case and then discussing how such principles were used to pinpoint the suspension and warning letter as a proximate cause.<sup>12</sup>

The majority relies on conclusory opinions that any untrained medical person could have suggested: that Luder's major depression and other debilitating psychological conditions manifested after September 15, 2007, and therefore the retaliation must be the cause. The majority finds that the ALJ had "ample" support for the conclusion that the "unfair treatment" caused Luder's "major depression" and that Luder's "psychiatric decline started shortly after his adverse treatment," or sometimes described as a "traumatic event." The majority points to Dr. Shaulov and Dr. Jorgensen as experts that provided the necessary medical causation testimony. But, as Continental points out, their declarations and deposition testimony are merely conclusory and provide no medical discussion of medical principles or methods that articulate how they isolated the retaliation as the proximate cause of Luder's damages after November 10, 2007, and how they ruled out the stress caused by the November 2007 line check ride and simulator tests and perhaps other stressors in Luder's life. The majority also asserts that the ALJ determined that "following the retaliation he suffered, Luder was not qualified for reinstatement to pilot." But, again, *Luder was flying real planes after the retaliation occurred* and passed a line check ride *on a real flight* in early November 2007 before he failed the simulator test on November 10, 2007.<sup>13</sup> Luder's brief also fails to identify any substantial evidence supporting the ALJ's conclusion of medical causation.

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that, if un rebutted, could support an ALJ's finding of medical causation between retaliation and the employee's long-term psychologically debilitating injury.

<sup>12</sup> See, e.g., *Pascouau v. Martin Marietta Corp.*, 994 F. Supp. 1276, 1278-1279 (D. Colo. 1998)(defendant's medical expert testimony provides an example of what it means to substantively examine and analyze a plaintiff's psychological profile to determine medical causation).

<sup>13</sup> The majority also relied on Dr. Elliott's report as substantial evidence of medical causation, but we rejected that same report in our remand order. We previously recognized that the "initiating event" described in that report simply captured Luder's explanation for the cause of his psychological illnesses but Dr. Elliott did not provide any causation analysis nor ascribe any significance to the "initiating event" described by Luder. See ARB Remand Order at 19-20.



In the end, where complex and long-term psychological injury (e.g., major depression) is an issue, the employee's evidence should include some articulated, rationalized medical opinion evidence that explains with some level of specificity how the unlawful employment action caused or substantially contributed to the psychological injury and how the expert ruled out more temporally proximal stressors. I would hope, if the appellate court finds that we erred in affirming that ALJ's causation finding, that the reviewing court will remand this matter to the Board to articulate an appropriate standard for measuring the legal sufficiency of expert medical testimony regarding debilitating psychological injuries, such as major depression and post-traumatic stress disorder.

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**