United States Department of Labor
Employees' Compensation Appeals Board

W.L., Appellant	)	
and	)	**Docket No. 13-1727**
	)	**Issued: February 4, 2014**
DEPARTMENT OF ENERGY, BONNEVILLE POWER ADMINISTRATION, Vancouver, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 10, 2013 appellant filed a timely appeal of the January 14, 2013 decision of the Office of Workers' Compensation Programs (OWCP) which denied his claim for an occupational disease. He also appealed a June 21, 2013 decision of OWCP which denied merit review. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.[2]

[1] 5 U.S.C. §§ 8101-8193.

[2] Under the Board's *Rules of Procedure* appeal must be filed within 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Board. One hundred and eighty days from January 14, 2013, the date of OWCP's decision, was July 13, 2013. Since using July 16, 2013, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark was July 10, 2013 which rendered the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an occupational disease in the performance of duty; and (2) whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 22, 2012 appellant, then a 60-year-old administrative land surveyor, filed an occupational disease claim alleging that he developed pneumonia as a result of exposure to dust and mold while working at an employing establishment building. He became aware of his condition and realized it was causally related to his employment on July 20, 2012. Appellant stopped work on July 19, 2012.

In a July 25, 2012 report, Dr. Rachel L. Zubko, a Board-certified internist, noted that appellant had been hospitalized from July 20 to 25, 2012. In a July 25, 2012 statement, appellant noted that on July 20, 2012 he woke in the morning with trouble breathing, a painful left chest and trouble with mobility. During his hospitalization, he was diagnosed with pneumonia and sepsis shock. Appellant noted that his work area had poor air circulation and when furniture or cubical walls were moved his breathing was affected. He reported being a lifelong asthmatic.

On August 19, 2012 OWCP advised appellant of the evidence needed to establish his claim. It requested that he submit a physician's reasoned opinion addressing the causal relationship of his claimed respiratory condition to specific work factors.

In an August 19, 2012 statement, appellant noted working for the employing establishment in the same cubicle since August 29, 2010. He advised that the offices and cubicles in the building had been rearranged for about a year and, when this activity occurred, he noticed more health issues when the dust circulated. In September 2011, appellant experienced a series of illnesses and multiple sinus infections and believed that the workplace contributed to his illness. He reported being a lifelong asthmatic with a history of bronchitis and under the supervision of his pulmonologist since December 2010.

The employing establishment submitted an August 15, 2012 statement from Jay D. Conant, appellant's supervisor, who noted that appellant was hospitalized with pneumonia and was asthmatic. Appellant had sinus and respiratory issues since arriving to work in the employing establishment building. Mr. Conant noted that appellant worked at a cubicle and was provided with a personal air purifier and a desktop air purifier to clean the air around him.

In a July 20, 2012 admission report, Dr. Christopher L. Fraley, a Board-certified pulmonologist, noted that appellant presented with cough, chest pain and an elevated white blood cell count after 12 hours of fevers, chills and coughing. Appellant's history was significant for morbid obesity and lifelong asthma. Dr. Fraley noted findings upon examination of expiratory wheezes with bronchial breathing signs. He diagnosed pneumonia, septic shock, acute renal failure, insomnia and gastroesophageal reflux disease.

A July 25, 2012 discharge summary from Dr. Zubko noted that a chest x-ray revealed a left lower lobe infiltrate.[3] She stated that appellant's course of treatment was complicated by acute renal failure which resolved. Dr. Zubko diagnosed septicemia, septic shock, acute kidney failure, flexural effusion, obstructive sleep apnea, asthma, morbid obesity and hypertension.

On July 31, 2012 appellant was treated by Dr. Siyavash Mohandessi, a Board-certified family practitioner, for insomnia, pneumonia and sepsis after a hospitalization. Dr. Mohandessi noted findings of fatigue, cough without chest tightness, shortness of breath and wheezing. He diagnosed chronic insomnia. On August 12, 2012 Dr. Gary Smith, a Board-certified family practitioner, treated appellant for chest pain and history of pneumonia. Physical examination revealed diffuse expiratory squeaks to auscultation. Dr. Smith noted that the chest x-ray revealed fluid in the lingual and diagnosed cough, chest pain, reactive airway disease and recent pneumonia. Dr. Yoon Park, a Board-certified family practitioner, treated appellant on August 21, 2012. Appellant reported that his cough improved but was still productive, he had no runny nose, congestion, fever or chills. He stated that he missed work about four days a month due to the chronic cough. Dr. Park diagnosed cough improving, unclear etiology.

In an August 27, 2012 report, Dr. Jeffrey Lin, a Board-certified pulmonologist, noted that appellant was hospitalized on July 20, 2012 and was diagnosed with sepsis, community acquired pneumonia and hypertension. When appellant returned to work, he noticed that his cough, hoarseness and shortness of breath recurred. He reported that the employing establishment was moving cubicles and had problems with the air filtration system but once the air filtration system was repaired his symptoms improved. Dr. Lin first treated appellant on December 1, 2010 when appellant had been at his current job for about three months. He noted that appellant's current problems included acute sinusitis, maxillary, asthma, cough, dyspnea, hoarseness, obstructive sleep apnea, pulmonary nodule and vertigo. On examination Dr. Lin noted a moderately obese person, expiratory wheezes in the left lung, hoarseness and pleuritic chest pain. He diagnosed hoarseness, obstructive sleep apnea, asthma and status post pneumonia hospitalization. Appellant reported the possibility of work exposure as a contributing factor to his respiratory symptoms. Dr. Lin opined that based upon appellant's description of improvement of his symptoms outside the workplace and exacerbation upon returning it was a possible correlation which should be investigated.

On January 14, 2013 OWCP denied appellant's claim on the grounds that the medical evidence did not establish that his pulmonary condition was causally related to the work-related exposure.

On April 27, 2013 appellant requested reconsideration. He asserted that laboratory testing revealed issues with the air conditioning system where he worked. Appellant and his coworkers developed conditions from working in the building. He submitted e-mails dated July 18, 2012 to April 8, 2013 regarding the air quality testing performed and subsequent remediation. In a March 5, 2013 laboratory report, Microlab Northwest concluded that the environment would be uncomfortable for most people. It was noted that the glass fiber concentration was above the level associated with health complaints for both short and long glass

[3] A July 23, 2012 chest x-ray showed persistent left lower lobe consolidation and probable left pleural effusion.

fiber, there was an elevation of mite frass and mite parts in the area, the amount of combustion residue in this environment was unusually high with an issue of both the odor of smoke and a soiling issue for clothing, and the presence of dermestid beetle debris and mosquitoes in the area. The consultant recommended a thorough cleaning as well as remediation of the ventilation system and an inspection of the glass fiber insulation and ceiling tile or exposed fireproofing to isolate such materials from the office space. An April 10, 2013 indoor air quality evaluation conducted on February 13, 2013 revealed the general parameters for CO2, CO, temperature and relative humidity were within recommended levels without indication of significant water intrusion or fungal growth. The report made recommendations for an upgrade of the air conditioning system and insulation.

In a June 21, 2013 decision, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review.

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. When an employee claims that he or she sustained an injury in the performance of duty, he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. Appellant must also establish that such event, incident or exposure caused an injury.[4]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 the specific employment factors identified by the claimant.[5]

[4] *See Walter D. Morehead,* 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury). *See generally John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *Solomon Polen*, 51 ECAB 341 (2000).

ANALYSIS -- ISSUE 1

It is not disputed that, as part of his work environment, appellant's cubicle was moved and he was exposed to dust in his workplace. The Board finds, however, that he has not submitted sufficient medical evidence to establish that his pulmonary condition was caused or aggravated by the workplace exposures.

In an August 27, 2012 report, Dr. Lin treated appellant in follow up for chest pain that had required hospitalization. He reported returning to work and noticing cough, hoarseness and shortness of breath recurred while at work after the employing establishment moved cubicles. Appellant stated that his symptoms improved when the employer's air filtration system was repaired. Dr. Lin noted findings on examination and diagnosed hoarseness, obstructive sleep apnea, asthma and status post pneumonia hospitalization. He noted that appellant reported the possibility of work exposure as a contributing factor to his respiratory symptoms. Dr. Lin opined that, based on appellant's description of improvement of his symptoms outside the workplace and exacerbation upon returning, it was a possible correlation and further investigation was appropriate.

Although Dr. Lin provided some support for causal relationship, his report is insufficient to establish the claimed pulmonary condition was causally related to appellant's employment duties. His opinion is speculative on causal relationship as he noted "a possible correlation" between appellant's respiratory symptoms and any work exposures.[6] Dr. Lin provided no medical reasoning explaining how particular workplace exposure or conditions caused or aggravated appellant's diagnosed conditions. The need for medical rationale is particularly important in view of appellant's history of asthma. This report is insufficient to meet appellant's burden of proof.

On July 20, 2012 Dr. Fraley diagnosed pneumonia, septic shock, acute renal failure, insomnia and gastroesophageal reflux disease. He noted appellant's history was significant for lifelong asthma. On July 25, 2012 Dr. Zubko noted that appellant was hospitalized from July 20 to 25, 2012 for coughing and severe left-sided pleuritic chest pain. Appellant was diagnosed with septicemia, septic shock, acute kidney failure, flexural effusion, obstructive sleep apnea, asthma, morbid obesity and hypertension. In an August 21, 2012 report, Dr. Park noted appellant's history of asthma and hospitalization in July 2012 but stated that appellant's condition was of an "unclear etiology." These reports are insufficient to establish appellant's claim as the physician's did not address how appellant's employment caused or aggravated the diagnosed medical conditions.[7] The reports from Dr. Mohandessi and Dr. Smith did not provide any history of employment exposure or address whether appellant's employment had caused or aggravated his medical condition. These reports are insufficient to establish the claim.

[6] *See D.D.*, 57 ECAB 734 (2006) (medical opinions that are speculative or equivocal in character are of diminished probative value).

[7] *A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

The Board finds that the medical evidence does not establish that appellant sustained a pulmonary condition causally related to his employment. An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.[8] Causal relationships must be established by rationalized medical opinion evidence. As noted the medical evidence is insufficient to establish appellant's claim. Consequently, OWCP properly found that appellant did not meet his burden of proof in establishing his claim.

On appeal, appellant asserts that his pulmonary condition was caused by his workplace exposure to dust and debris in the work area and a faulty air conditioning system and that an April 10, 2013 air quality report supported his position. As noted above, the medical evidence does not establish that appellant sustained a pulmonary condition causally related to his employment. Reports from appellant's physicians failed to provide sufficient medical rationale explaining how his pulmonary condition was causally related to particular employment exposures.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,[9] OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that [OWCP] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by [OWCP]; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [OWCP]."[10]

[8] *See Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[9] 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.606(b)(2).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.[11]

ANALYSIS -- ISSUE 2

OWCP denied appellant's claim on the grounds that he failed to provide sufficient medical evidence to establish that the diagnosed condition was causally related to his work duties. Thereafter, it denied his reconsideration request, without a merit review.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. He asserted in his April 27, 2013, reconsideration request that laboratory testing performed where he worked revealed an air conditioning system problem that caused employees illnesses. These assertions do not show a legal error by OWCP or a new and relevant legal argument. The underlying issue in this case is whether appellant's diagnosed condition is causally related to appellant's workplace exposures. That is a medical issue which must be addressed by relevant new medical evidence.[12] However, appellant did not submit any new and relevant medical evidence in support of his claim.

As noted, appellant submitted a March 5, 2013 laboratory report and an April 10, 2013 indoor air quality evaluation report at the employing establishment. While this evidence addresses the environmental status of the building where he works, it was not accompanied by any medical evidence. As explained, the underlying issue in this claim is whether the medical evidence establishes that appellant's claimed condition was caused or aggravated by workplace exposures. These reports of laboratory testing are not relevant to this underlying medical issue. Therefore, this new evidence is insufficient to warrant reopening the case for a merit review.

Appellant also submitted e-mails dated July 18, 2012 to April 12, 2013 and February 6 to April 8, 2013 regarding the air quality testing performed and subsequent remediation. However, as noted above, the e-mails from nonphysicians are not relevant to the underlying medical issue. Therefore, this new evidence is not relevant and is insufficient to warrant reopening the case for a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). He did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

[11] *Id*. at § 10.608(b).

[12] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that his claimed conditions were causally related to his employment. The Board further finds that OWCP properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the June 21 and January 14, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 4, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board