United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
and	)	**Docket No. 07-1312**
	)	**Issued: October 1, 2007**
DEPARTMENT OF DEFENSE, NATIONAL GEOSPATIAL INTELLIGENCE AGENCY, Arnold, MO, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 17, 2007 appellant filed an appeal of a January 3, 2007 decision of the Office of Workers' Compensation Programs denying certain conditions included in his occupational disease claim and a March 27, 2007 decision denying his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has established that he sustained a deviated septum requiring surgery causally related to accepted occupational exposures to airborne allergens; (2) whether appellant established a period of total disability for work causally related to accepted workplace exposures; and (3) whether the Office properly denied appellant's request for a hearing.

FACTUAL HISTORY

On December 16, 2004 appellant, then a 41-year-old cartographic analyst, filed an occupational disease (Form CA-2) claiming that workplace exposures to mold, fungi, bacteria and particulates in the 4-D work area from February 1, 1996 through late 2002 necessitated a December 26, 2002 septoplasty.[1] He also asserted that workplace exposures aggravated his chronic sinusitis, nasal obstructions and asthma, conditions he developed in childhood. Appellant was off work from September 13, 2002 to January 11, 2003.[2]

Appellant submitted environmental test results showing that, from May 29, 2001 to October 9, 2002, the 4-D area in which he worked had high levels of airborne mold and fungal spores, bacteria and particulates. The employing establishment confirmed his exposures from February 1996 through September 2002. Appellant was transferred from the affected area in late September 2002.

In a September 13, 2002 chart note, Dr. Philip J. Shanahan, an employing establishment physician specializing in occupational medicine, noted appellant's occupational exposures to airborne mold. He related appellant's symptoms of dyspnea, sneezing and nasal congestion.[3] Dr. Shanahan diagnosed multiple allergies, asthma and chronic sinusitis. He restricted appellant to light duty and recommended his transfer out of area 4-D due to the air quality problems.

On December 26, 2002 Dr. Jeffrey T. Fierstein, an attending Board-certified otolaryngologist, performed a septoplasty, partial inferior turbinectomy, functional endoscopic surgery of the anterior-posterior ethmoid sinuses and a maxillary antrostomy. In a January 29, 2003 letter, he noted that appellant presented on December 4, 2002 with "a nasal septal deviation.[4] [Appellant] thought that his nasal obstruction was a workman's compensation case." Dr. Fierstein diagnosed turbinate hypertrophy and a mildly deviated septum, resolved by the December 26, 2002 surgery.

In a February 10, 2003 letter, Dr. Tibor C. Kopjas, an attending Board-certified internist, noted treating appellant for asthma beginning on February 2, 2002. He noted reviewing environmental test reports and that appellant underwent surgery on December 26, 2002. Dr. Kopjas stated: "[appellant] worked in an area that was high in mold, bacteria and contaminants. He developed sinus problems that required missing work. The work environment irritated the sinus to the point [that] the antibiotics did not work. [Dr. Kopjas did] feel [that] the work environment caused the sinus problems."

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[1] The Board notes that appellant did not submit requests for reimbursement for any medical expenses related to the December 26, 2002 surgery.

[2] The Board notes that appellant did not submit a formal claim for wage loss.

[3] September 13, 2002 spirometry and a September 16, 2002 chest x-ray were within normal limits.

[4] A December 15, 2002 computed tomography scan of appellant's sinuses showed significantly advanced sinusitis when compared to January 15, 1998 studies, with prominent nasal turbinates causing near obstruction on the right and mucoperiostial thickening in the sphenoid sinuses.

In a February 12, 2003 letter, Dr. Shanahan stated that appellant's preexisting tendency toward allergy and upper respiratory problems was quite likely being aggravated by his exposure to high fungal counts in area 4-D.

In a December 29, 2004 letter, the Office advised appellant of the additional evidence needed to establish his claim. The Office emphasized the importance of submitting a rationalized report from his attending physician explaining how and why the identified workplace exposures would cause the claimed upper respiratory and sinus conditions.

By decision dated February 2, 2005, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that the factual evidence was insufficient to establish the alleged workplace exposures.

In a letter postmarked February 25, 2005, appellant requested an oral hearing.

By decision dated and finalized September 13, 2006, an Office hearing representative found that the case was not in posture for a decision and remanded it for further development. The hearing representative found that appellant established that he was exposed to bacteria, mold, fungi and airborne irritants in the performance of duty as alleged. The hearing representative further found that the medical evidence was sufficient to require further development. The hearing representative directed that the Office refer appellant, the medical record and a statement of accepted facts to an appropriate specialist for a rationalized opinion regarding the causal relationship between the established workplace exposures and the diagnosed aggravation of appellant's sinus and upper respiratory conditions.

On October 10, 2006 the Office referred appellant, the medical record and a statement of accepted facts to Dr. Richard Barnes, an osteopathic physician Board-certified in otolaryngology, for a second opinion examination. Dr. Barnes submitted a November 9, 2006 report reviewing the medical record and statement of accepted facts. An examination of appellant's sinuses and pharynx revealed no abnormalities. Dr. Barnes diagnosed allergic rhinitis and a history of chronic sinusitis. He opined that it was possible that appellant's preexisting respiratory and sinus conditions were temporarily aggravated by his workplace exposures. Dr. Barnes stated that the septoplasty was not work related. He explained that a deviated septum was caused by congenital defect or trauma, not allergies and sinusitis.

In a November 20, 2006 note, an Office medical adviser declined to review Dr. Barnes' report as appellant was referred on an issue of causation and not for hearing loss.

By decision dated January 3, 2007, the Office accepted appellant's claim "for a temporary aggravation of chronic sinusitis and allergic rhinitis, not to exceed September 30, 2002."[5] The Office denied appellant's claim for surgery for a deviated septum on the grounds that causal relationship was not established. The Office found that Dr. Fierstein did not provide medical rationale explaining how and why the accepted workplace exposures would

[5] There is no evidence of record that the Office accepted any period of total disability or paid appellant any wage-loss compensation.

necessitate surgery for a deviated septum. Also, Dr. Barnes explained that allergies and rhinitis were not competent to cause a deviated septum.

In a letter postmarked March 1, 2007, appellant requested an oral hearing.

By decision dated March 27, 2007, the Office denied appellant's request for a hearing on the grounds that it was not timely filed. The Office found that appellant's request for a hearing was postmarked on March 1, 2007, more than 30 days after issuance of the Office's January 3, 2007 decision. The Office denied appellant's request for a hearing on the grounds that the issues involved could be addressed equally well by requesting reconsideration and submitting new evidence establishing that the septoplasty was causally related to factors of his federal employment.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[6] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[7] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[8]

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 the 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 medial 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.[9]

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[6] 5 U.S.C. §§ 8101-8193.

[7] *Joe D. Cameron*, 41 ECAB 153

[8] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

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

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained temporary aggravation of chronic sinusitis and allergic rhinitis, ceasing not later than September 30, 2002. The Office denied appellant's claim for a deviated nasal septum requiring surgery on December 26, 2002 on the grounds that the medical evidence was insufficient to establish that the accepted exposures caused a deviated septum.

Appellant submitted reports from Dr. Shanahan, an employing establishment physician specializing in occupational medicine, and Dr. Kopjas, an attending Board-certified internist. Both physicians opined that the accepted workplace exposures to airborne mold, bacteria and particulates aggravated appellant's preexisting allergies and sinusitis. Neither Dr. Shanahan nor Dr. Kopjas addressed whether the accepted exposures necessitated septoplasty.

Dr. Fierstein, an attending Board-certified otolaryngologist, diagnosed a deviated nasal septum and turbinate hypertrophy. He performed a septoplasty, partial inferior turbinectomy and sinus surgeries on December 26, 2002. Dr. Fierstein noted in a January 29, 2003 letter that appellant believed that the nasal obstruction was work related. However, he did not opine that the accepted occupational exposures necessitated the septoplasty and sinus surgeries. Without medical rationale explaining how and why the accepted workplace exposures caused objective pathophysiologic changes to appellant's septum and sinuses necessitating the December 26, 2002 surgery, Dr. Fierstein's opinion is insufficient to meet appellant's burden of proof in establishing causal relationship.[10]

Dr. Barnes, an osteopathic physician Board-certified in otolaryngology and a second opinion examiner, stated that appellant's deviated septum was caused by trauma or congenital defect. He explained that allergies and sinusitis could not cause a deviated septum. Dr. Barnes' opinion thus negates the causal relationship appellant asserts.

Therefore, appellant has not established that he sustained a deviated septum in the performance of duty, as he submitted insufficient rationalized medical evidence to establish the asserted causal relationship. The Office therefore properly found that the December 26, 2002 surgery was not work related.

LEGAL PRECEDENT -- ISSUE 2

Under the Act, the term "disability" is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.[11] For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.[12] Whether a particular injury causes an employee to become disabled for

[10] *See Jimmie H. Duckett*, 52 ECAB 332 (2001); *Frank D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[11] *See Prince E. Wallace*, 52 ECAB 357 (2001).

[12] *Dennis J. Balogh*, 52 ECAB 232 (2001).

work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[13] The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[14] The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his disability and entitlement to compensation.[15]

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained a temporary aggravation of chronic sinusitis and allergic rhinitis, ceasing on or before September 30, 2002. On appellant's claim form, he noted that he was off work from September 16, 2002 to January 11, 2003. Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between the accepted workplace exposures and his claimed total disability from September 16, 2002 to January 11, 2003.[16]

In support of his claim, appellant submitted a February 10, 2003 letter from Dr. Kopjas stating that the accepted exposures caused "sinus problems that required missing work." However, Dr. Kopjas did not provide any dates of total disability or explain how and why the accepted exposures would disable appellant for work for any period. His opinion is therefore insufficient to establish any period of total disability.[17] Appellant also submitted a September 13, 2002 from Dr. Shanahan restricting him to light duty and recommending his transfer away from the contaminated work area. But Dr. Shanahan did not find appellant totally disabled for work for any period. Dr. Fierstein did not note any period of total disability.[18]

Thus, none of appellant's physicians provided rationalized medical opinion finding his disabled for work for any portion of the period September 16, 2002 to January 11, 2003 due to the accepted temporary aggravation of chronic sinusitis and allergic rhinitis. Therefore, the medical evidence submitted is insufficient to meet appellant's burden of proof in establishing a period of total disability.[19]

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[13] *Gary J. Watling*, 52 ECAB 278 (2001).

[14] *Manuel Garcia*, 37 ECAB 767 (1986).

[15] *Amelia S. Jefferson*, 57 ECAB __ (Docket No. 04-568, issued October 26, 2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[16] *Alfredo Rodriguez*, 47 ECAB 437 (1996).

[17] *Id*.

[18] Dr. Barnes, an osteopathic physician Board-certified in otolaryngology and a second opinion physician, did not opine whether the accepted temporary aggravation of chronic sinusitis and rhinitis caused any period of total disability for work.

[19] *Alfredo Rodriguez*, *supra* note 16.

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary … is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[20] Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[21] Office procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[22]

ANALYSIS -- ISSUE 3

The Office denied appellant's claim by January 3, 2007 decision. Appellant's letter requesting an oral hearing was postmarked on March 1, 2007, more than 30 days after the January 3, 2007 decision. Thus, the Office properly found that appellant's request for a review of the written record was not timely filed under section 8124(b)(1) of the Act and that he was not entitled to an examination of the written record as a matter of right.

The Office then exercised its discretion and determined that appellant's request for a review of the written record could equally well be addressed by requesting reconsideration and submitting additional evidence establishing that the claimed surgery to correct a deviated septum was causally related to his federal employment. As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.[23] The Board finds that there is no evidence of record that the Office abused its discretion in denying appellant's request. Thus, the Board finds that the Office's denial of appellant's request for an oral hearing was proper under the law and facts of this case.

CONCLUSION

The Board finds that appellant has not established that he sustained a deviated nasal septum in the performance of duty. The Board further finds that appellant has not established a period of total disability causally related to the accepted temporary aggravation of allergic rhinitis and chronic sinusitis. The Board further finds that the Office properly denied appellant's request for a hearing.

[20] 5 U.S.C. § 8124(b)(1).

[21] 20 C.F.R. §§ 10.616, 10.617.

[22] *Claudio Vasquez*, 52 ECAB 496 (2002).

[23] *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 27 and January 3, 2007 are affirmed.

Issued: October 1, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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