United States Department of Labor
Employees' Compensation Appeals Board

P.W., Appellant	)	
and	)	**Docket No. 13-1184**
	)	**Issued: September 16, 2013**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Cheyenne, WY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 17, 2013 appellant timely appealed the March 14, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 claim.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on January 15, 2013.

FACTUAL HISTORY

On February 1, 2013 appellant, a 65-year-old program support assistant, filed a claim for a traumatic injury -- "breathing problems" -- that allegedly occurred on January 15, 2013. She reportedly suffered an asthma attack from exposure to patient odor. Appellant claimed that her

[1] 5 U.S.C. §§ 8101-8193.

asthma subsequently developed into pneumonia. Her February 1, 2013 claims (Form CA-1) did not include any supporting medical evidence or factual evidence substantiating her alleged occupational exposure on January 15, 2013. Appellant has an accepted claim (xxxxxx401) for aggravation of extrinsic asthma which arose on or about April 9, 1999.

On February 8, 2013 OWCP wrote to both appellant and the employing establishment regarding the need for factual and medical evidence with respect to the claimed injury arising on January 15, 2013.It advised her of the five basic elements to establishing entitlement under FECA. Appellant also received a questionnaire regarding her claimed occupational exposure and possible exposure to irritants outside the workplace. OWCP specifically inquired about any prior history of pulmonary conditions, including asthma, bronchitis and all known allergies. Additionally, it described the type of medical evidence necessary to establish appellant's claim, including the need for a physician's opinion.

In a February 21, 2013 response, the employing establishment indicated that on January 15, 2013 appellant was exposed to a veteran "with a very strong smell of marijuana about him." This exposure was reportedly the cause of appellant's asthma reaction. The employing establishment explained that she worked in an open area where veterans, family and others checkin for care. The employing establishment noted its plans to construct a glass-enclosed receiving area which might reduce the possibility of similar reactions in the future.

Appellant submitted a March 1, 2013 response to OWCP's February 8, 2013 questionnaire. She described the January 15, 2013 patient odor as a combination of "body odor" and a "strong cigarette (sic) smell." The exposure lasted only "seconds." Appellant also noted a prior history of asthma dating back to 1999.She was reportedly a nonsmoker. Following the January 15, 2013 employment incident, appellant was first seen by Shannon L. Cook, a certified family nurse practitioner (FNP-C).

OWCP received medical records dating back to November 2006 pertaining to appellant's asthma-related treatment, as well as other nonrespiratory/pulmonary conditions such as gastroesophageal reflex, sleep apnea, hiatal hernia, hypertension, anxiety, various upper and lower extremity orthopedic injuries, breast cancer with bilateral mastectomy and reconstructive surgery and a six-day psychiatric care hospitalization in February 2013.

With respect to her claimed January 15, 2013 asthma attack, appellant was seen that afternoon by Ms. Cook, a nurse practitioner, who diagnosed asthma exacerbation from tobacco exposure by a patient. She reported that a patient had come in smelling of cigarette smoke and suddenly she could not breathe. The incident happened so quickly that it scared appellant. Prior to seeing Ms. Cook, appellant took two doses of DuoNeb while at work. The medication relieved her wheezing.

Appellant saw Ms. Cook again on January 24, 2013. Her symptoms had reportedly worsened. Appellant had a fever, was wheezing and had been coughing up thick green-yellow secretions. She recently returned from a weekend visit to see her two-month-old grandchild. Appellant reported there were a lot of fans and people. Ms. Cook again diagnosed asthma exacerbation.

Appellant next saw Ms. Cook on January 31, 2013. She was reportedly doing a lot better since her last visit. Ms. Cook diagnosed exacerbation of asthma and noted that appellant identified marijuana smoke as an asthma trigger. Appellant told Ms. Cook that she worked in the ambulatory care department and everytime someone came in smelling of marijuana smoke her lungs would tighten right up. She now kept an air freshener close to her desk and was using her rescue inhaler once or twice daily.

In addition to the January 2013 treatment notes, Ms. Cook provided contemporaneous work excuses for January 16, 24, 25 and 31, 2013.[2]

By decision dated March 14, 2013, OWCP denied appellant's traumatic injury claim. The record lacked probative medical evidence containing a diagnosis related to the January 15, 2013 employment incident. OWCP noted that all of the evidence relevant to the claimed injury was provided by a nurse practitioner who was not considered a physician under FECA.

LEGAL PRECEDENT

A claimant seeking benefits under FECA has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.[3]

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether "fact of injury" has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[4] The second component is whether the employment incident caused a personal injury.[5]

Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists and social workers are not considered "physician[s]" as defined under

[2] Ms. Cook also excused appellant from work for 14 days beginning February 21, 2013.However, it is unclear whether this 14-day work excuse due to "medical illness" is related to appellant's asthma exacerbation. On February 14, 2013 Ms. Cook diagnosed anxiety and the record indicates that appellant was hospitalized for psychiatric care from February 14 to19, 2013.Her February 21, 2013 work excuse does not specifically mention appellant's asthma or her anxiety as the reason(s) for her excused absence. Thus, it is unclear for what "medical illness" appellant was excused beginning February 21, 2013.

[3] 20 C.F.R. § 10.115(e), (f); *seeJacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

[4]*Elaine Pendleton*, 40 ECAB 1143 (1989).

[5]*John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question which generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.*Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).*Id.*

FECA.[6]Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[7] However, a report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician.[8]

ANALYSIS

Appellant submitted various treatment records documenting her prior history of asthma. The record also indicates that OWCP previously accepted a claim for aggravation of extrinsic asthma which arose on or about April 9, 1999. With respect to the current claim for injury arising on January 15, 2013, OWCP has accepted that the employment incident occurred as alleged. Thus, appellant has established the first component of fact of injury. However, OWCP denied her traumatic injury claim because she did not satisfy the second component of fact of injury. Appellant failed to demonstrate that the January 15, 2013 employment incident caused a personal injury.

Nurse PractitionerCook saw appellant on January 15, 2013 and diagnosed asthma exacerbation. She noted that appellant had a reaction at work to a patient who smelled of cigarette smoke. Ms. Cook saw appellant again on January 24 and 31, 2013 and similarly diagnosed asthma exacerbation. Her latest report also referenced marijuana smoke as an asthma trigger. Ms. Cook is not a "physician" as that term is defined under FECA. Also, her January 2013 treatment records were not countersigned by a qualified physician.

OWCP's February 8, 2013 development letter advised appellant of the necessity of submitting a narrative report from a qualified physician. The letter specifically noted, "[n]urse practitioners and physician assistants are not considered qualified physicians under FECA unless the medical report is countersigned by a physician." OWCP left appellant a similar message via voicemail on March 8, 2013. Despite OWCP's clear instructions, the only medical evidence appellant submitted relevant to the claimed injury of January 15, 2013 was Ms. Cook's January 2013 treatment records.

In her April 17, 2013 application for review (AB-1), appellant acknowledged that she had been told that she needed a physician's signature on her progress notes. She also acknowledged that Ms. Cook was not a practicing physician. Appellant noted that she asked Ms. Cook to have the physicians she worked under cosign the notes and submit them to OWCP. When she checked back, it had reportedly already been done. The Board notes that the record on appeal does not include any additional copies of Ms. Cook's January 2013 treatment notes that have been countersigned by a qualified physician.[9]

[6] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[7] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1)(January 2013).

[9] The current record does not include any new evidence received after the March 14, 2013 decision. But even if new evidence had been submitted, the Board is precluded from considering such evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

Appellant has not submitted probative medical evidence demonstrating that her accepted January 15, 2013 employment exposure caused a personal injury. Accordingly, OWCP properly denied her traumatic injury claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision.Pursuit to 5 U.S.C. §8128(a) and 20 C.F.R. §§ 10.605 through 10.601.

CONCLUSION

Appellant has not established that she sustained an injury in the performance of duty on January 15, 2013.

ORDER

IT IS HEREBY ORDERED THATthe March 14, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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