

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TRACY J. LUSTRI and DEPARTMENT OF THE INTERIOR,
BUREAU OF LAND MANAGEMENT, Roseburg, OR

*Docket No. 02-2344; Submitted on the Record;
Issued June 2, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained an asthma attack and migraine while in the performance of duty.

On April 23, 2002 appellant, then a 46-year-old clerical assistant, filed a traumatic injury claim alleging that she had an asthma attack and migraine the previous day caused by cigarette smoke coming up the stairwell into her office cubicle.

By letter dated May 10, 2002, the Office of Workers' Compensation informed appellant of the factual and medical evidence necessary to establish her claim. Appellant responded on May 22, 2002, stating that workers replacing a downstairs door were smoking, although that was prohibited, and the smoke drifted up the stairs to her office.

Appellant stated that the exposure lasted all day and that her lungs started to close down. She went home and used a prescribed inhaler. The next day she sustained a migraine from the smoke but returned to work after treatment. However, she had to leave and was then off work until April 30, 2002. Appellant mentioned her previous claims for allergic reactions to smoke and other pervasive odors and added that her medical records would be submitted directly from her physician.

On June 12, 2002 the Office denied appellant's claim on the grounds that no medical evidence had been received.

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained an asthma attack and migraine while in the performance of duty.

Under the Federal Employees' Compensation Act,¹ an employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged by the

¹ 5 U.S.C. §§ 8101-8193.

preponderance of the reliable, probative and substantial evidence.² To determine whether an injury was sustained in the performance of duty, the Office begins with an analysis of whether fact of injury has been established.³

Generally, fact of injury consists of two components, which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.⁴ The second component, whether the employment incident caused a personal injury, can generally be established only by medical evidence.⁵

In this case, the Office accepted that the smoke incident at work on April 22, 2002 happened as appellant alleged. However, the record contains no medical evidence showing that inhalation of cigarette smoke caused an asthma attack at work or resulted in a migraine headache the next day. Without a medical report from a physician diagnosing asthma and migraine, relating these conditions to the incident at work, and providing medical rationale to support such a conclusion, appellant cannot meet her burden of proof to establish that she sustained compensable injuries under the Act.

Inasmuch as the Office informed appellant of the need to submit a rationalized medical opinion on the causal relationship between the work incident and her alleged conditions and appellant did not provide the requisite evidence, the Board finds that the Office properly denied her claim.⁶

² *Michael W. Hicks*, 50 ECAB 325, 328 (1999); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

³ *Earl David Seal*, 49 ECAB 152, 153 (1997); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2(a) (June 1995).

⁴ *Linda S. Jackson*, 49 ECAB 486, 487 (1998).

⁵ *Michael E. Smith*, 50 ECAB 313, 316 (1999).

⁶ On appeal, appellant submitted an April 23, 2002 report from Dr. Sam J. Russo, an osteopathic practitioner. The Board cannot review this evidence on appeal. See 20 C.F.R. § 501.2(c); *Thomas W. Stevens*, 50 ECAB 288, 289 n.2 (1999) (the Board is precluded from reviewing evidence that was not before the Office when it issued its final decision). Appellant may wish to request reconsideration from the Office and present this evidence, as explained in the appeal rights accompanying the Office's June 12, 2002 decision.

The June 12, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 2, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member