

**United States Department of Labor
Employees' Compensation Appeals Board**

SCOTT R. FARIA, Appellant

and

**DEPARTMENT OF THE NAVY, PEARL
HARBOR NAVAL SHIPYARD, HI, Employer**

)
)
)
)
)
)
)

**Docket No. 04-2071
Issued: January 27, 2005**

Appearances:

Scott R. Faria, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 19, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision of January 22, 2004 which denied his claim for a traumatic injury, and a June 25, 2004 decision which denied modification of the January 22, 2004 decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case

ISSUE

The issue on appeal is whether appellant has met his burden of proof in establishing that he contracted an upper respiratory infection, eye infection and middle ear infection from a coworker while in the performance of duty.

FACTUAL HISTORY

On May 7, 2003 appellant, then a 43-year-old rigger, filed a traumatic injury claim alleging that on April 8, 2003 he contracted an upper respiratory infection, left eye infection and left middle ear infection from a coworker. Appellant stopped work on April 8, 2003 and returned on April 21, 2003.

Appellant submitted a statement dated May 7, 2003 indicating that on March 21, 2003 a coworker reported to work with a cough and hoarseness. On March 24, 2003 another coworker developed similar symptoms and was totally incapacitated. Appellant advised that on April 8, 2003 he developed similar symptoms and became incapacitated. Appellant sought treatment from Dr. Roy J. Ebisu, a Board-certified internist, who noted in a disability certificate dated April 11, 2003 that appellant was incapacitated from April 8 to 18, 2003.

By letter dated May 20, 2003, the Office asked appellant to submit a comprehensive medical report from his treating physician which included a reasoned explanation as to how the specific work factors or incidents identified by appellant had contributed to his claimed upper respiratory infection.

Michael Harrison, appellant's supervisor, submitted a statement dated May 27, 2003 which advised that during the months of March and April 2003 an employee was ill with the flu and his symptoms lasted for two months. He advised that the sick employee was a coworker of appellant; however, rarely did appellant and the ill coworker work in close proximity to one another.

In a decision dated June 27, 2003, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that his condition was caused by his exposure to a sick fellow employee.¹

By letter dated July 9, 2003, appellant requested a review of the written record and submitted additional evidence. Employing establishment medical records from April 16 to May 9, 2003 indicated that appellant was treated for an infection. An audiogram dated April 30, 2003 revealed normal hearing in the right ear; however, slight sensorineural hearing loss in the left ear. In a May 11, 2003 medical report, Dr. Wilson T. Murakami, a Board-certified internist, treated appellant for an upper respiratory tract infection and plugging in his left ear. He noted findings upon physical examination of left serous otitis media and borderline hearing loss in the left ear. Appellant submitted a report from Dr. Ebisu dated June 2, 2003, which noted that appellant presented on April 11, 2003 with a moderate cough, yellow mucus and sore throat. He diagnosed acute bronchitis and an eye infection.

In a decision dated January 22, 2004, the Office hearing representative affirmed the June 27, 2003 decision.

By letter dated March 17, 2004, appellant requested reconsideration. In support of his request, appellant submitted a report from Dr. Ebisu dated March 3, 2004, who advised that on April 9 and 11, 2003 he treated appellant for acute bronchitis. He noted that appellant's symptoms consisted of a sore throat, headache and productive cough. Dr. Ebisu advised that his notes did not indicate how appellant contracted this illness, however, he noted that "there is a possibility" that appellant contracted this illness from an infected coworker.

¹ 5 U.S.C. §§ 8101-8193.

In a decision dated June 25, 2004, the Office denied modification of the January 22, 2004 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Act 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 of the Act, that an injury was sustained 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.²

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. 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 which is alleged to have occurred.³ In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.⁴ An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.⁵ A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.⁶ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.⁷

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.⁸ The weight of medical evidence is determined by its reliability, its probative

² Gary J. Watling, 52 ECAB 357 (2001).

³ Michael E. Smith, 50 ECAB 313 (1999).

⁴ John J. Carlone, 41 ECAB 354 (1989).

⁵ See Michael W. Hicks, 50 ECAB 325 (1999).

⁶ *Id.*

⁷ Michael E. Smith, *supra* note 3.

⁸ Leslie C. Moore, 52 ECAB 132 (2000).

value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁹

ANALYSIS

Appellant alleged that he contracted an upper respiratory infection, left eye infection and left middle ear infection on April 8, 2003 after exposure to an infected coworker. The record establishes that appellant was exposed to coworkers who became ill with the flu in March and April 2003. The Board finds, however, that the medical evidence is insufficient to establish that appellant contracted an upper respiratory infection, left eye infection and left middle ear infection from his coworkers.

Appellant submitted treatment notes from Dr. Ebisu, who advised that he presented on April 11, 2003 with symptoms of a moderate cough, yellow mucus and sore throat. The physician diagnosed acute bronchitis and an eye infection and advised that appellant was incapacitated from April 8 to 18, 2003. Dr. Ebisu did not state that appellant's condition was work related¹⁰ nor did he provide a rationalized opinion as to the causal relationship between appellant's employment and the diagnosed conditions.¹¹ These reports are insufficient to establish appellant's claim of a causal relationship between coworkers who became ill during March and April 2003 and his infections.

Other reports from Dr. Ebisu from March 3, 2004 noted treating appellant on April 9 and 11, 2003 for acute bronchitis. His notes did not indicate how appellant contracted the infection; however, he indicated that there was a possibility that appellant contracted the illness from an infected coworker. The Board finds that Dr. Ebisu's opinion of a "possibility" that appellant's condition was contracted from an infected coworker, is speculative. The Board has held that medical opinions which are speculative or equivocal in character have little probative value.¹² Therefore, this report is insufficient to meet appellant's burden of proof.

Dr. Murakami advised that he treated appellant for an upper respiratory tract infection and plugging in his left ear. However, he did not state that appellant's condition was work related nor did he provide a rationalized opinion regarding the causal relationship between appellant's upper respiratory infection, eye infection and middle ear infection and the factors of employment believed to have caused or contributed to such condition.¹³ This report is also insufficient to meet appellant's burden of proof.

⁹ *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

¹⁰ See *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

¹¹ See *Jimmie H. Duckett*, *supra* note 9.

¹² See *Frank Luis Rembisz*, *supra* note 10.

¹³ See *Jimmie H. Duckett*, *supra* note 9.

The employing establishment treatment notes and audiogram do not mention that appellant's condition was work related or provide a rationalized opinion regarding the causal relationship between appellant's condition and the factors of employment believed to have caused or contributed to such condition.¹⁴ 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 or her condition was caused, precipitated or aggravated by his or her employment is sufficient to establish causal relationship.¹⁵

CONCLUSION

The Board therefore finds that, as none of the medical reports provided an opinion that appellant developed an employment-related injury in the performance of duty, appellant failed to meet his burden of proof.¹⁶

ORDER

IT IS HEREBY ORDERED THAT the June 25 and January 22, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 27, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

¹⁴ See *Jimmie H. Duckett*, *supra* note 9.

¹⁵ See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹⁶ See *Calvin E. King*, 51 ECAB 394 (2000).