United States Department of Labor
Employees' Compensation Appeals Board

H.J., Appellant	)	
	)	**Docket No. 07-2273**
and	)	**Issued: April 2, 2008**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 5, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated May 7, 2007 which denied his claim for an occupational disease. He also appealed a decision dated July 27, 2007 which denied his request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that he developed a sinus condition and facial pain while in the performance of duty; and (2) whether the Office properly denied his request for review of the written record.

FACTUAL HISTORY

On April 25, 2006 appellant, then a 54-year-old mail processor, filed an occupational disease claim alleging that he developed a severe sinus infection and facial pain while

performing his work duties. He became aware of his condition on March 7, 2006. Appellant stopped work on April 7, 2006.

Appellant submitted reports from Dr. Morton Goldfarb, a Board-certified otolaryngologist, dated March 14 to 27, 2006, who noted that appellant worked at the post office and was treated for pain in his left maxillary sinus. Dr. Goldfarb stated that the physical examination revealed allergic changes of the nose and a diagnostic computerized tomography (CT) scan revealed ethmoid involvement on both sides and recommended nasoseptal reconstruction. In an operative report dated April 7, 2006, he performed a nasal septal reconstruction, bilateral submucous turbinoplasty, resection, removal of left concha bullosa, bilateral endoscopic nasal antral windows and left anterior ethmoidectomy. Dr. Goldfarb diagnosed nasal deformity, turbinate hypertrophy, concha bullosa left and chronic sinusitis. In an April 14, 2006 report, he advised that appellant's history was significant for recurrent disease aggravated by and precipitated by exposure to tremendous amounts of dust and pollutants at work and recommended avoiding dusty environments. A March 14, 2006 CT scan of the sinus revealed involvement of the left ethmoid, concha bullosa of the left side, with marked thickening and swelling, chronic infection in the floor of the left maxillary sinus and severe nasal deformity.

The employing establishment submitted a report from Weston Solutions, Inc., dated November 7, 1995, a company that collected air samples at the employing establishment before and after installation of an air filtering system for the purpose of evaluating the efficiency of the air filtering system with respect to dust. The results of the dust samples at the employing establishment suggested that the dust levels were two orders of magnitude lower than the Occupational Safety and Health Administration (OSHA) permissible exposure level for dust with no statistical difference between pre and post-testing. In a July 22, 2004 report, Weston Solutions indicated none of the samples collected and analyzed for total dust at the employing establishment were in excess of the legal or recommended limits. The samples collected were less than 1.5 percent of the OSHA permissible exposure levels for total dust and less than 2.5 percent of that recommended for total dust. The employing establishment submitted an April 28, 2006 statement from Greg Wilson, manager of maintenance operations, who noted the workroom floor of the employing establishment had less airborne dust because vacuums were used for cleaning machines instead of compressed air. Mr. Wilson noted that an industrial hygienist attached collection devices to maintenance employees who were exposed to the highest level of dust which was only a fraction of what was considered to be problematic.

The employing establishment submitted a memorandum to the Office dated May 9, 2006 and noted that the employing establishment employed a full-time maintenance staff that operated 24 hours per day with air filters located throughout the facility to trap dust and prevent it from settling. The memorandum referenced the November 7, 1995 and July 22, 2004 air samples collected by Weston Solutions which revealed that the employing establishment was in compliance with the OSHA dust level standards.

In a letter dated June 20, 2006, the Office advised appellant of the type of evidence needed to establish his claim, particularly asking that he submit a physician's reasoned opinion addressing how specific employment factors caused his claimed condition.

Appellant submitted an undated statement and noted that since 1987 he was exposed to dust from machines and was never issued protective equipment. He noted that in March 2006 he had facial and tooth pain that he attributed to dust exposure at work. Also submitted were reports from Dr. Michael Vaughn, a Board-certified family practitioner, dated March 12, 1992 to July 25, 2006, who treated appellant for bronchitis, sinusitis and a virus. Reports from Dr. Goldfarb, dated May 8 and July 5, 2006, noted that appellant underwent surgery for chronic sinusitis in April 2006 and was progressing well postoperatively. He stated that dust exposure at work contributed to appellant's chronic sinusitis. Dr. Goldfarb noted that he could not prove that there was dust in the environment but opined that there was no question that exposure to increased particulate matter in the air was the precipitating factor to appellant's nasal drainage and allergic rhinosinusitis. He recommended appellant avoid dust exposure and wear a mask.

The employing establishment submitted an August 4, 2006 statement from Phillip Edwards, the employing establishment environmental specialist, who noted that the levels of particulate dust identified and measured in studies conducted in the past indicated minimal levels that were far below OSHA permissible exposure limits.

In a September 21, 2006 statement of accepted facts, the Office noted that appellant operated delivery barcode sorter and optical character reader machines seven hours per day and wore a surgical mask at work. Results of air sampling studies were also noted.

On September 21, 2006 the Office referred appellant for a second opinion to Dr. J. Scott Robertson, a Board-certified otolaryngologist. The Office provided Dr. Robertson with appellant's medical records, a statement of accepted facts and a detailed description of his duties. In an October 18, 2006 report, Dr. Robertson noted reviewing the records provided and performed a physical examination of appellant. He noted appellant's history was significant for nasal and sinus surgery on April 7, 2006, a nerve block for left-sided facial pain which was performed on September 29, 2006 and a root canal. Dr. Robertson noted that examination revealed a straight septum, no evidence of infection or abnormalities, normal oral cavity and oropharynx and normal neck and ears. He opined that there was no evidence of a causal relationship between the dust exposure and appellant's symptoms of facial pain. Dr. Robertson opined that dust exposure by itself would not necessarily precipitate, worsen or accelerate facial pain. He noted that appellant had a history of one sinus infection per year and opined that it was unlikely that any work exposure to dust or other irritant would be a causative factor to what was considered an infrequent sinusitis problem. Dr. Robertson further opined that dust concentration found by Weston Solutions would not have caused appellant's sinus condition. He advised that the diagnosed condition of sinusitis was not medically connected to the factors of employment and he did not believe the sinus and nasal surgery was indicated. Dr. Robertson determined that appellant had no subjective complaints, no disability and no physical limitations.

In a decision dated May 7, 2007, the Office denied appellant's claim on the grounds that the medical evidence did not establish that his condition was caused by his work duties.

By letter dated June 6, 2007 and postmarked June 7, 2007, appellant requested a review of the written record.

By decision dated July 27, 2007, the Office denied appellant's request for a review of the written record. The Office found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved, and that the request was also denied because the issues in this case could be addressed by requesting reconsideration from the Office and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

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 timely filed within the applicable time limitation period of the Act, that the 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.[1]

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 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.[2]

ANALYSIS -- ISSUE 1

It is not disputed that appellant's duties as a mail processor included operating delivery barcode sorter and optical character reader machines for approximately seven hours per day and he was exposed to dust in the workplace environment. However, he has not submitted sufficient medical evidence to establish that workplace dust exposure caused or aggravated a diagnosed condition.

[1] *Gary J. Watling*, 52 ECAB 357 (2001).

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

Appellant submitted reports from Dr. Goldfarb dated March 14 to May 8, 2006, who noted that appellant worked at the post office and was treated for pain in his left maxillary sinus. However, these reports are insufficient to establish the claim as Dr. Goldfarb did not specifically address whether appellant's employment activities caused or aggravated a diagnosed condition.[3] In an April 14, 2006 report, Dr. Goldfarb advised that appellant's history was significant for recurrent disease aggravated by and precipitated by exposure to "tremendous" amounts of dust and pollutants at work. On July 5, 2006 he opined that appellant's exposure to increased particulate matter in the air precipitated his nasal drainage and allergic rhinosinusitis. The Board finds that, although Dr. Goldfarb supported causal relationship, he did not provide medical rationale explaining the basis of his conclusory opinion regarding the causal relationship between appellant's allergic sinusitis and facial pain and the factors of employment.[4] For example, Dr. Goldfarb did not explain the process by which breathing dust particles would cause the diagnosed allergic sinusitis condition and why such condition would not be due to any nonwork factors such as an allergy to a pet, food, bedding or mildew at home. Additionally, his opinion does not appear to be based on an accurate factual background as he indicated that appellant was exposed to "tremendous" amounts of dust at work although the latest air sample studies showed that employing establishment dust levels were in compliance with OSHA standards.[5] Therefore, these reports are insufficient to meet appellant's burden of proof.

Other medical reports submitted by appellant, such as the CT scan of the sinus and reports from Dr. Vaughn did not provide an opinion on the causal relationship between appellant's job and his diagnosed sinusitis and facial pain.

To further develop the claim, the Office referred appellant to Dr. Robertson who found no evidence of causal relationship between the dust exposure and appellant's symptoms of facial pain. Dr. Robertson opined that dust exposure by itself would not necessarily precipitate, worsen or accelerate facial pain. He noted that appellant had a history of one sinus infection per year and opined that it was unlikely that any work exposure to dust or other irritant would be a causative factor to what was considered an infrequent sinusitis problem. Dr. Robertson advised that the dust concentration found in the employing establishment would not have caused appellant's sinus condition. He found that the diagnosed sinusitis was not medically connected to employment factors and he did not believe the sinus and nasal surgery was indicated. Dr. Robertson found no basis to attribute appellant's symptoms and conditions to his employment.

The Board finds that the medical evidence does not establish that appellant has any sinus or facial 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

[3] *A.D.*, 58 ECAB ___ (Docket No. 06-1183, issued November 14, 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).

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

[5] *See Vernon R. Stewart*, 5 ECAB 276, 280 (1953) (where the Board found that medical opinions based on histories that do not accurately reflect the basic facts are of little value).

apparent during a period of employment nor the belief that her condition was caused, precipitated or aggravated by her employment is sufficient to establish causal relationship.[6] Causal relationships must be established by rationalized medical opinion evidence. As noted the medical evidence is insufficient to establish appellant's claim. Consequently, the Office therefore properly found that appellant did not meet his burden of proof in establishing his claim.

LEGAL PRECEDENT -- ISSUE 2

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 her claim before a representative of the Secretary."[7] Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provides 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.[8] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[9] The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

> "If the claimant is not entitled to a hearing or review (i.e., the request was untimely, the claim was previously reconsidered, etc.), [Branch of Hearings and Reviews] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons."[10]

ANALYSIS -- ISSUE 2

Appellant requested a review of the written record in a letter dated June 6, 2007 and postmarked June 7, 2007. Section 10.616 of the federal regulations provides: "The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."[11] As the date of the request was more than 30 days after issuance of the May 7, 2007 Office decision, appellant's request for a review of the written record was untimely. The Office was correct in finding in its July 27, 2007 decision that appellant was not entitled to a review of the written record as a matter of right because his request was not made within 30 days of the Office's May 7, 2007 decision. Appellant's request for a hearing of the written record was dated June 6, 2007 and postmarked June 7, 2007, 31 days after May 7, 2007, and thus it is outside the 30-day statutory limitation.

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

[7] 5 U.S.C. § 8124(b)(1).

[8] 20 C.F.R. §§ 10.616, 10.617.

[9] *Delmont L. Thompson,* 51 ECAB 155 (1999); *Eddie Franklin,* 51 ECAB 223 (1999).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record,* Chapter 2.1601.4 (b)(3) (October 1992).

[11] 20 C.F.R. § 10.616.

Since appellant did not request a review of the written record within 30 days of the Office's May 7, 2007 decision, he was not entitled to a review of the written record under section 8124 as a matter of right.

While the Office also has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right, the Office, in its July 27, 2007 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for a review of the written record on the basis that the case could be resolved by submitting additional evidence to the Office in a reconsideration request. The Board has held that, 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 deduction from established facts.[12] The evidence does not indicate that the Office committed any act in connection with its denial of appellant's request for a review of the written record that could be found to be an abuse of discretion. Thus, the Office properly denied appellant's request for a review of the written record.

CONCLUSION

The Board therefore finds that appellant has not established that he developed an occupational disease causally related to factors of his federal employment. The Board further finds that the Office properly denied appellant's request for a review of the written record as untimely.

[12] *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the July 27 and May 7, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 2, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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