United States Department of Labor
Employees' Compensation Appeals Board

Y.H., Appellant	)	
and	)	**Docket No. 09-181**
	)	**Issued: August 17, 2009**
DEPARTMENT OF THE ARMY, WALTER REED ARMY MEDICAL CENTER, Washington, DC, Employer	)	

Appearances:
Charles M. Johnson, for the appellant
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 October 27, 2008 appellant filed a timely appeal from a December 19, 2007 decision of the Office of Workers' Compensation Programs denying her traumatic injury claim. 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 is whether appellant established that she sustained an injury on November 1, 2007 in the performance of duty, as alleged.

On appeal, appellant's representative contends that her absence from November 1 through 20, 2007 should be covered by continuation of pay and that she should be reimbursed for any out-of-pocket medical expenses.

FACTUAL HISTORY

On November 7, 2007 appellant, then a 39-year-old medical technologist, filed a traumatic injury claim (Form CA-1). Her supervisor reported that on November 1, 2007

appellant was exposed to biohazardous material when she was splashed in the face and eyes due to a detached instrument waste line. Appellant opted for postexposure human immunodeficiency virus (HIV) prophylaxis as part of the routine follow-up, which caused nausea and prevented her from working. A coworker stated that he witnessed the splash and saw appellant run to the sink holding her face.

On December 19, 2007 the Office notified appellant of the deficiencies in her claim and requested that she provide additional evidence.

On November 4, 2007 appellant sought medical treatment from Dr. Henry Chilin Chu, Board-certified in emergency medicine, for nausea and vomiting. She reported that she was exposed to contaminated blood products and started prophylactic treatment. Two days prior, appellant started recurrent vomiting with intractable symptoms. Dr. Chu diagnosed intractable vomiting with nausea, loss of appetite, chills and abdominal pain.

In a medical report dated November 14, 2007, Dr. Robert N. Wood-Morris, Board-certified in internal medicine and infectious disease, stated that two weeks prior appellant's face was splashed with fluid from a blood analyzer machine. The fluid was a composite of blood products from multiple persons and machine tubing flush fluid. Dr. Wood-Morris stated that the risk of HIV or hepatitis C virus (HCV) exposure was exceptionally low, although not zero percent, and that he advised preventative treatment. Appellant reported that the treatment was causing nausea and fatigue and that she was missing work due to these symptoms. She did not take the last two doses and the symptoms improved. Dr. Wood-Morris opined that appellant did not tolerate the kaletra and truvada regime well and missed work for two weeks. He stated that given the difficulty of appellant's experience, he would not continue the treatment.

In a November 16, 2007 medical report, Dr. Wood-Morris stated that on November 1, 2007 appellant experienced a work-related exposure to blood products warranting initiation of postexposure prophylaxis (PEP). Appellant reported difficulties tolerating the procedure and that the symptoms were so severe that she missed two weeks of work. Dr. Wood-Morris stated that the medicine was stopped and that he anticipated a resolution of symptoms shortly.

Appellant returned to full duty on November 21, 2007.

By decision dated December 19, 2007, the Office found that the November 1, 2007 work event occurred as alleged, but denied appellant's claim on the grounds that she did not submit sufficient medical evidence containing a diagnosis that could be connected to the events.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,[2] including that she is an "employee" within the meaning of

[1] 5 U.S.C. §§ 8101-8193.

[2] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

the Act[3] and that she filed her claim within the applicable time limitation.[4] The employee must also establish that she sustained an injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[6] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[7]

ANALYSIS

The Office accepted that on November 1, 2007 appellant was splashed in the face with body fluid from a blood analyzing instrument and chose to undergo routine HIV prophylaxis. The issue is whether appellant sustained a causally related injury.

Appellant submitted a November 4, 2007 medical report from Dr. Chu, who reported that appellant was exposed to contaminated blood products and started prophylactic treatment. Dr. Chu diagnosed intractable vomiting, nausea and vomiting, vomiting, loss of appetite, chills and abdominal pain. Further, in a November 14, 2007 medical report, Dr. Wood-Morris stated that appellant's face was splashed with fluid representing a composite of blood products from multiple persons. He stated that the risk of HIV/HCV exposure was exceptionally low but that he advised preventative treatment. Appellant complained that the preventative treatment was causing nausea and fatigue. Dr. Wood-Morris opined that appellant did not tolerate the kaletra and truvada regime well and that appellant should not continue the treatment. Similarly, in a November 16, 2007 medical report, he maintained that appellant experienced a work-related splash of blood products warranting prophylactic treatment. Appellant reported difficulties tolerating the procedure and that the severity of symptoms caused her to miss work. Dr. Wood-Morris stated that the treatment was stopped and that he anticipated a resolution of the symptoms soon.

Section 10.303 of the Office's regulations provide that simple exposure to a workplace hazard, such as an infectious agent, does not constitute a work-related injury entitling an employee to medical treatment under the Act unless the employee has sustained an identifiable

[3] *See M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

[4] *R.C.*, 59 ECAB ___ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

[5] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

[7] *T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

injury or medical condition as a result of that exposure.[8] Thus, the fact that appellant was exposed to potentially contaminated body fluid is, in itself, insufficient to establish that she sustained an injury. For her claim to be compensable, she must establish, with sufficient medical evidence, that she sustained an identifiable injury.

The Board finds that none of the medical evidence is sufficient to establish that appellant sustained an identifiable injury as a result of her exposure to body fluids. In the November 4, 2007 medical report, Dr. Chu diagnosed intractable vomiting with nausea, loss of appetite, chills and abdominal pain. However, these diagnoses are better characterized as symptoms and do not constitute a firm medical diagnosis.[9] Similarly, in the November 14 and 26, 2007 medical reports, Dr. Wood-Morris reported that appellant was experiencing severe symptoms, including nausea and fatigue, however, he did not identify a specific, compensable injury. Therefore, the Board finds that appellant did not establish that she sustained an identifiable injury as a result of her work-related exposure on November 1, 2007.[10]

The Board notes that the Office regulations and procedure manual provide that preventive treatment can be authorized where an employee experiences complications of preventive measures which are provided or sponsored by an agency, such as an adverse reaction to prophylactic immunization, or where there is actual or probable exposure to a known contaminant due to an injury, including appropriate measures where exposure to HIV has occurred.[11] However, the Board has held that the Office can only authorize preventive treatment after an injury has been established.[12] As noted above, appellant did not establish that she sustained an injury as a result of the exposure, thus, the provision does not apply in the instant case.

The Board further notes that the Office manual provides special procedures for high risk employment where an employee is routinely presented with situations which may lead to infection by contact with animals, human blood, bodily secretions and other substances. The Office procedure manual provides:

> "a. *Physical Injury and Prophylactic Treatment*. For claims based on transmission of a communicable disease where the means of transmission and the

[8] 20 C.F.R. § 10.303.

[9] *See Deborah L. Beatty*, 54 ECAB 340 (2003). *See also Larry M. Leudtke*, Docket 03-1564 (issued September 2, 2003) (where the Board found that the diagnoses of dizziness, headache, light headedness and anxiety described symptoms and did not constitute a firm diagnosis of a medical condition).

[10] *See A.D.*, 58 ECAB ___ (Docket No. 06-1183, issued November 14, 2006). *See also Deborah L. Beatty*, *supra* note 9.

[11] 20 C.F.R. § 10.313(a); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.7 (April 1992).

[12] *See C.M.*, Docket 06-2174 (issued April 18, 2007) (where the Board noted that appellant would not be afforded coverage under Chapter 3.400.7(a)(2) of the Office's procedure manual, which only affords preventive care once there is an injury involving actual or probable exposure).

incubation period are medically feasible, the CE [claims examiner] should do the following:

> (1) *If the source of infection is a known or probable* carrier of the disease, the CE should accept the case for the physical injury involved and authorize prophylactic treatment (see FECA PM 3-400.7a).
>
> (2) *If the source of infection is unidentified* or the source's status is unknown, the CE should accept the claim for the physical injury involved. Prophylactic treatment for the underlying disease will not be an issue, since a known carrier is not involved."[13]

In the case of *N.S.,*[14] the Board found that the employee was not required to establish with medical evidence that her exposure to Hepatitis C, resulting from being struck by a contaminated needle during her employment as a nurse, caused a personal injury. Rather, because her employment was considered high risk, the evidence only had to establish that the source of the infection was a known or probable carrier of the disease.

Although appellant's employment as a medical technologist in a hospital would be considered high risk due to her routine potential exposure to infection, Board precedent is distinguishable from the *N.S.* case. Here, appellant's claim is not based on the transmission of a communicable disease but, rather, due to side effects caused by treatment due to potential exposure. Thus, the Board finds that special procedures for high-risk employment are not applicable in this case.[15]

Finally, the Board notes appellant's representative's contention on appeal that continuation of pay should be granted for the period November 1 through 20, 2007 and that medical expenses should be reimbursed. As the Office has not rendered a decision regarding this issue, it is not properly before the Board on this appeal.[16]

---

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *High Risk Employment*, Chapter 2.805.8 (October 1995).

[14] 59 ECAB ___ (Docket No. 07-1652, issued March 18, 2008)

[15] *See Lillian A. Ferraro,* Docket No. 04-1957 (issued December 17, 2004) (where the Board found that appellant, a dental hygienist, did not establish that she sustained a compensable injury due to being struck by a dirty dental instrument despite claims that she became sick from the postexposure HIV prophylactic treatment. The Board specifically held that appellant did not submit any medical evidence containing a diagnosed condition related to the incident).

[16] *See* 20 C.F.R. § 501.2(c), which provides that the Board's jurisdiction is limited to final decisions issued by the Office under the Act. The Board does note that section 10.205(a) of the Office's regulations, 20 C.F.R. § 10.205(a), describes the criteria for a claimant to become eligible to quality to continuation of pay, one of which includes that an individual must: "(1) [h]ave a 'traumatic injury' … which is job related and the cause of the disability, and/or the cause of lost time due to the need for medical examination and treatment." Thus, the Board has held that, if a claimant did not sustain an employment-related traumatic injury, the individual was not entitled to continuation of pay. *See e.g., Carol A. Lyles,* 57 ECAB 265 (2005).

CONCLUSION

The Board finds that appellant did not establish that she sustained an injury on November 1, 2007 in the performance of duty due to exposure to potentially contaminated body fluids.

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 17, 2009
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