

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

K.C., Appellant

and

**SOCIAL SECURITY ADMINISTRATION,
Iselin, NJ, Employer**

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**Docket No. 08-632
Issued: March 13, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 31, 2007, appellant timely appealed the November 28, 2007 merit decision of the Office of Workers' Compensation Programs, which denied her occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant sustained an injury in the performance.

FACTUAL HISTORY

On July 12, 2007 appellant, then a 53-year-old technical expert, filed an occupational disease claim for "[b]reathing problems." She first became aware of her condition on November 15, 2006; however, it was not until July 3, 2007 that she realized her condition was caused or aggravated by her employment. Appellant attributed her condition to sitting under a

vent that was blowing cold air. She was hospitalized on July 3, 2007 and reportedly advised that her bronchospasm was caused by cold air.¹

In a separate statement dated July 13, 2007, appellant indicated that she developed a cough in November 2006 that lasted approximately five months. During this timeframe, cold air was blowing on her and she reportedly requested on more than one occasion that she be moved to a location that was not beneath a vent. Appellant also stated that she conducted interviews in an area of the office where cold air was blowing and occasionally, clients would ask her to have the air shut off. She also noted that other employees had complained about the cold air.

On December 6, 2006 appellant sent an e-mail to Kathleen Brehm, district manager, requesting that her desk be moved to another location that was not beneath a vent. She explained that there was cold air constantly blowing on her back and that she had to ask almost daily to have the air turned off. In response, the assistant office manger, Lucie Voss, advised appellant that the blower vent had been moved further away from her desk. On December 14, 2006 appellant sent Ms. Voss an e-mail advising that cold air was still blowing on her. She reiterated her request to have her desk moved to a location not below a blower. In a December 22, 2006 e-mail, Ms. Brehm advised appellant that on the infrequent occasions when the heating, ventilating and air conditioning (HVAC) system was not working properly, she could temporarily move to another location. On January 17, 2007 appellant formally requested a reasonable accommodation due to the cold air blowing on her. She asked that her desk/workstation be moved to a location not beneath a blower. Appellant claimed that her request for an accommodation was denied by letter dated February 22, 2007.²

Appellant also reported that on June 27, 2007 there was a problem with the air conditioning for the entire building and in response, building management installed portable air conditioning units, one of which was in the area of her desk. On Monday, July 2, 2007 she left work early because she developed a sore throat and a headache. Appellant claimed that the blowers were blowing cold air directly on her. She said she coughed all that evening and eventually sought treatment in the ER for breathing difficulties, nausea and chest pains.

Appellant indicated that she first sought treatment for her cough in February 2007. At that time, her primary care physician, Dr. Richard Menashe, prescribed an inhaler and Advair Diskus. Dr. Menashe also reportedly administered breathing tests. Appellant said she first saw a pulmonary specialist, Dr. Jeffrey L. Pesin, on March 28, 2007.³ Dr. Pesin reportedly administered a breathing test and prescribed medication. Appellant indicated that Dr. Pesin continued to monitor her condition. She denied any prior smoking history, but she was reportedly exposed to second-hand smoke in the workplace. Appellant also claimed not to have had any pulmonary problems prior to November 2006.

¹ In a supplemental statement dated September 10, 2007, appellant indicated that she asked the emergency room (ER) physician what could have caused her condition and the physician replied that breathing in cold, polluted air can provoke bronchospasm.

² Appellant's reasonable accommodation request was not formally denied, but instead was held in abeyance pending her submission of additional information.

³ Dr. Pesin is a Board-certified internist with a subspecialty in pulmonary disease.

The employing establishment acknowledged that since December 2006 it had experienced intermittent problems with either lack of or excessive heat or air circulation. Additionally, the employing establishment confirmed that appellant had requested a permanent reassignment on December 6, 2006 due to air circulation near her workstation. However, on December 22, 2006 the employing establishment only permitted appellant to temporarily move her seat when her location was not comfortable. The employing establishment explained that there were dozens of air circulation vents around the office and most employees sat either directly under a vent or within several feet of at least one vent. Appellant reportedly was not seated directly beneath a vent.

The HVAC vendor reportedly informed the employing establishment that the overhead air was a constant 59 degrees. The circulating vents cycled on and off depending on the surrounding temperature and the settings on the thermostats. The employing establishment indicated that remedial steps had been taken to attempt to resolve the ongoing problems with the HVAC system. This included recalibration of all thermostats, moving the circulation vent and thermostat that was closest to appellant's workstation and installing locks on the 17 existing thermostats. These actions were reportedly completed by early February 2007 and according to the employing establishment, the level and frequency of complaints about the HVAC system subsided until problems developed that following summer. The employing establishment acknowledged a problem with the building's air conditioning system and that portable units were installed on June 27, 2007, one of which was placed "near [appellant's] work area." It was noted that appellant took off sick July 2, 2007 and returned July 10, 2007. Because of ongoing problems with the HVAC system, upon returning to work appellant was advised that she could permanently move her seat if a coworker in her unit was willing to exchange seats. The employing establishment indicated that appellant moved the following day.

Appellant submitted various laboratory results, objective studies and treatment records, the latter of which are largely illegible. In a March 29, 2007 report, Dr. Pesin indicated that appellant complained of a cough that persisted for six months. He advised that she most likely had post-nasal drip, which was giving her the cough. A March 30, 2007 chest x-ray was "[u]nremarkable." A May 8, 2007 pulmonary function study revealed moderate restrictive lung disease with superimposed small airway obstruction.

On July 3, 2007 appellant was seen in the JFK Medical Center ER. She was treated for pleurisy and bronchospasm and received a final diagnosis of pleuritic chest pain. A computerized tomography (CT) scan of the chest showed no evidence of pulmonary embolism. Appellant was prescribed an inhaled bronchodilator and nonsteroidal anti-inflammatory medication and advised to follow up with Dr. Pesin.

In a decision dated November 28, 2007, the Office denied appellant's occupational disease claim. It found, among other things, that the evidence did not establish that the claimed medical condition was employment related.

LEGAL PRECEDENT

A claimant seeking benefits under the Federal Employees' Compensation Act⁴ has the burden of establishing the essential elements of 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.⁵

To establish that an injury was sustained in the performance of duty, a claimant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a 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 diagnosed condition is causally related to the identified employment factors.⁶

ANALYSIS

Appellant claimed that her respiratory condition was due to exposure to cold air that primarily emanated from ceiling vents in her workplace. The Office found that a factual basis for appellant's claim had not been established. We disagree. The employing establishment acknowledged that there were recurring problems with its HVAC system between December 2006 and July 2007. The employing establishment also indicated that remedial steps had been taken to address appellant's concerns regarding the overhead air ventilation system. While appellant may not have been seated directly beneath an air vent, the employing establishment explained there were dozens of air circulation vents around the office and most employees sat either directly under a vent or within several feet of at least one vent. Contrary to the Office's finding, the record supports appellant's general allegation of workplace exposure to overhead air ventilation of varying degrees. According to the employing establishment's HVAC vendor, "the overhead air [was] a constant 59 degrees." Lastly, the employing establishment confirmed that there were portable air conditioning units in place on or about June 27, 2007 and one of those units was in the general vicinity of appellant's desk.

While appellant was exposed to air from a portable air conditioning unit and circulating overhead air, which she considered to be too cold, there is no indication in the record that these conditions were a factor in her diagnosed respiratory condition. She has been diagnosed with

⁴ 5 U.S.C. §§ 8101-8193 (2006).

⁵ 20 C.F.R. § 10.115(e), (f) (2008); see *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996). 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 factors 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 factors. *Id.*

⁶ *Victor J. Woodhams*, *supra* note 5.

post-nasal drip, pleurisy, bronchospasm and moderate restrictive lung disease and small airway obstruction. However, none of the medical evidence relates the various conditions to appellant's workplace exposure. In fact, none of the reports include a legible history of workplace exposure to cold air. Appellant claims she was told in the ER that breathing in cold, polluted air can provoke bronchospasm. This may very well have occurred. Appellant's July 3, 2007 ER discharge instructions indicate that bronchospasm often "occurs with bronchial infections." It goes on to say that "[a]llergies, inhaled chemicals and polluted or cold air can also provoke bronchospasm." But what it does not say is that cold office air was the competent factor in producing appellant's July 3, 2007 bronchospasm. According to appellant's September 10, 2007 statement, she never claimed that her physician told her the condition could be caused by air conditioning. The current record does not establish a causal relationship between the reported occupational exposure and appellant's diagnosed respiratory condition. Accordingly, the Office properly denied her occupational disease claim.

CONCLUSION

Appellant failed to establish that she sustained an injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the November 28, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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