

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

K.H., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Bowling Green, KY, Employer**

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**Docket No. 11-1417
Issued: December 20, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 24, 2011 appellant filed a timely appeal from a March 10, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on October 19, 2009, as alleged.

FACTUAL HISTORY

On January 7, 2010 appellant filed a traumatic injury claim alleging that on October 19, 2009, after returning to work after being absent with the flu, her cold became worse as her office

¹ 5 U.S.C. § 8101 *et seq.*

building did not have heat during cold weather. She noted that she worked from 7:50 a.m. until 1:45 p.m., at which time management decided to close the office. As a result, appellant suffered from a severe headache, aches in her entire body, a sore throat and coughing. She submitted numerous documents supporting the fact that there was no heat in her building on that date, including a February 10, 2009 internal memorandum by the senior individual tax advisory specialist, who noted that there was no heat as a result of construction. The overnight temperature for October 18 to 19, 2009 was below freezing and according to a coworker, the temperature felt like it was 55 to 60 degrees in the office on October 19, 2009.

In a report from an October 19, 2009 office visit, Dr. Haidong Nguyen, a Board-certified family practitioner, noted that appellant complained of aching, headache and sore throat. Appellant stated that she felt fine until that morning when she came to work and the gas was turned off. She was exposed to a cold office atmosphere, after which she started experiencing some chills, body aches and headaches. Dr. Haidong diagnosed pharyngitis, body aching and elevated blood pressure. In a note of the same date, he released appellant to return to work on October 22, 2009.

Appellant also submitted a February 8, 2010 report from Dr. Vaughan Allen, a Board-certified neurosurgeon, who indicated that she had degenerative disc disease and radiculopathy that started after a March 15, 2007 injury.

By decision dated February 25, 2010, OWCP denied appellant's claim finding that the medical evidence was insufficient to establish her claim.

In a February 18, 2010 letter, appellant responded to OWCP's query with regards to why she waited three months to file her claim. She stated that her employing establishment did not allow time off the counter for completing OWCP forms. Appellant forwarded a February 17, 2010 note by Dr. Nguyen, who stated that he saw her on October 14, 2009. At that time, she was suffering from sinusitis and bronchitis, but noted that her cough was better. On October 19, 2009 Dr. Nguyen noted that appellant experienced some body aching, headaches and sore throat. He diagnosed pharyngitis and body aching which was negative for flu. Dr. Nguyen stated, "There may be a cause of relationship between her sore throat, aching and headaches related to the cold exposure when she was in the office on that day."

On March 24, 2010 appellant filed a request for review of the written record. She forwarded documents attesting to the lack of heat in the building on October 19, 2009. Appellant contended that her attending physician indicated that there may be a relationship between her sore throat, aching and headaches related to the cold exposure. In a June 23, 2010 medical report, Dr. Kirk A. Fee, a Board-certified orthopedic surgeon, advised that he saw appellant on June 23, 2010 and discussed orthotics for her flat foot condition and limp after a total hip replacement.

By decision dated July 27, 2010, OWCP's hearing representative affirmed the February 25, 2010 decision.

By letter dated February 4, 2011, appellant requested reconsideration. In a September 1, 2010 report, Dr. Fee noted that he was treating her for orthopedic injuries to her neck and back as

well as her hip and knee. He stated that appellant brought to his attention that she worked on October 19, 2009 in a building that was below freezing. Dr. Fee opined that the cold temperature did not do anything anatomically to the arthritis in her knee, her hip or to the degenerative changes in her back and neck, but certainly temperatures that cold would make her uncomfortable. He stated that patients with arthritis benefit from a warmer environment.

By decision dated March 10, 2011, OWCP denied modification of its July 27, 2010 decision.

LEGAL PRECEDENT

An employee seeking compensation under FECA² has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,³ including that she is an “employee” within the meaning of FECA⁴ and that she filed her claim within the applicable time limitation.⁵ 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.⁶

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.⁷ Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.⁸

In order to satisfy the burden of proof, an employee must submit a physician’s rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.⁹ Neither the fact that the condition became apparent during a period of employment nor appellant’s belief that the employment caused or aggravated his condition is sufficient to establish causal relationship.¹⁰

² 5 U.S.C. §§ 8101-8193.

³ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

⁴ *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *See* 5 U.S.C. § 8101(1).

⁵ *R.C.*, 59 ECAB 427 (2008); *Kathryn A. O’Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

⁶ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁷ *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

⁸ *T.H.*, 59 ECAB 388 (2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

⁹ *Gary L. Fowler*, 45 ECAB 365 (1994).

¹⁰ *Phillip L. Barnes*, 55 ECAB 426 (2004); *Jamel A. White*, 54 ECAB 224 (2002).

ANALYSIS

The Board notes that there is no dispute that on October 19, 2009 appellant, worked in a building that had no heat. Although there was a dispute as to how cold the office was, the employing establishment and appellant agreed that the building was cold, which necessitated closing it at 1:45 p.m. OWCP determined that she established that the incident occurred on October 19, 2009, as alleged. The Board finds, however, that appellant did not submit sufficient medical evidence to establish causal relationship between the accepted employment incident and her sore throat, body aches, headache or coughing. Neither Dr. Allen nor Dr. Fee addressed these conditions. Rather Dr. Allen addressed appellant's degenerative disc disease and radiculopathy. Dr. Fee addressed her orthopedic injuries, noting only that the cold temperature did not affect her anatomically but that it could have caused her to feel uncomfortable.

The only physician to address a possible relationship between working in a cold office building on October 19, 2009 and appellant's symptoms was Dr. Nguyen, who treated her prior to her return to work on October 19, 2009 as well as on that date. Dr. Nguyen opined, "There may be a cause of relationship between her sore throat, aching and headaches related to the cold exposure when she was in the office that date." He did not provide a medical explanation for such causal relationship. A medical opinion not fortified by medical rationale is of little probative value.¹¹ Dr. Nguyen's opinion is speculative and equivocal as to causal relationship. He does not state that the cold caused a worsening of appellant's cold or flu condition, only that there could be relationship. A medical opinion on causal relationship does not have to be one of absolute certainty, but it must be one of reasonable medical certainty and not speculative or equivocal in nature.¹² The opinion should be expressed in terms of a reasonable degree of medical certainty.¹³

The Board finds that the weight of the medical evidence does not establish that appellant's sore throat, headache, body aches and cough were caused or aggravated by work-related exposure to a cold building on October 19, 2009. Accordingly, the Board finds that appellant did not establish her claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not establish that she sustained an injury in the performance of duty on October 19, 2009, as alleged.

¹¹ *M.V.*, Docket No. 10-1169 (issued December 17, 2010).

¹² *B.P.*, Docket No. 10-1593 (issued June 8, 2011).

¹³ *W.W.*, Docket No. 10-2306 (issued August 8, 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 10, 2011 is affirmed.

Issued: December 20, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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