



On appeal, appellant's representative contends that he was adversely affected by a large amount of mold in his workplace as verified by multiple air quality reports. Appellant contends that when he is away from his workplace his condition improves and when he returns, his various health problems reoccur.

### **FACTUAL HISTORY**

On August 31, 2010 appellant, then a 38-year-old service representative, filed an occupational disease claim (Form CA-2), alleging that he experienced irritated eyes and throat and bloodshot eyes as a result of exposure to mold in his workplace. He became aware of his condition and realized it was causally related to his federal employment on August 2, 2010. Appellant did not stop work.

In a statement received by OWCP on September 24, 2010, appellant's supervisor advised that test results showed that mold was present but not in sufficient quantities to present a health hazard. She stated that action had been taken to contain the mold and that the air testing to date did not establish that mold spores were present in the heating, ventilation and air conditioning system. The supervisor reported that appellant had a recurring cough and a rash on his face but there was no evidence that it was due to the mold.

Appellant submitted a September 25, 2009 indoor air quality report based on a survey taken on September 15, 2009 by Federal Occupational Health. Suspect mold was observed behind wallpaper at bottom corners of most of the windows in the south portion of the office as well as at least one window in the break room in the north end of the office. Suspect mold was observed at a wallpaper seam on the south perimeter wall as well as at a seam on the west perimeter wall. Spotting what could possibly be mold was observed at numerous locations in the south perimeter wall as well as on the southern portion of the west perimeter wall. The musty type odor was detected nearby each of the locations where mold was observed. The same odor was detected at numerous electrical receptacles found in the bottom portion of the south perimeter and southern portion of the west perimeter wall. The musty type odor was not present elsewhere in the office and there had been no complaints of such an odor. The area above the suspended ceiling at the perimeter walls was clean with no indication of roof or wall leakage and moisture readings indicated a slightly elevated moisture level at the bottom corners of the windows where mold was observed.

Results of four indoor air samples collected, when compared to two outdoor air samples, indicated that airborne levels of mold within the office were acceptable. The one surface sample collected from a visibly contaminated area indicated the presence of *Stachybotrys*. The following recommendations were made: (1) seal areas of wallpaper where suspect mold was visible; (2) determine the extent of suspect mold contamination within the office both beneath the perimeter wall wallpaper and within perimeter wall cavities; (3) adjust motorized dampers to assure the continuous flow of outdoor air during normal occupancy; (4) upgrade air filters; (5) conduct an overall review of the design and operation of the ventilation systems; and (6) assure compliance of relative humidity levels.

By letter dated October 8, 2010, OWCP notified appellant that the evidence submitted was not sufficient to support his claim and requested additional factual and medical evidence. It provided 30 days for him to respond to its inquiries and submit additional evidence.

By decision dated December 28, 2010, OWCP denied appellant's claim on the basis that the medical evidence submitted was insufficient to establish fact of injury. It found that, although the described employment exposures occurred as alleged, the medical evidence provided no firm diagnosis or establish causal relationship.

By letter postmarked January 28, 2011 and received February 9, 2011, appellant through his representative, requested an oral hearing.

By decision dated February 24, 2011, OWCP denied appellant's request for an oral hearing finding that it was untimely because it was not made within 30 days of the December 28, 2010 decision. It exercised its discretion and further denied appellant's request for the reason that the relevant issue of the case could be addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his claim. When he claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. An employee must also establish that such event, incident or exposure caused an injury.<sup>2</sup>

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

---

<sup>2</sup> See *Walter D. Morehead*, 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury). See generally *John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

It is not disputed that appellant was exposed to mold at his place of work. However, he has not submitted sufficient medical evidence to establish a firm diagnosis of conditions causally related to such exposure. Appellant submitted a September 25, 2009 air quality survey report, which does not constitute probative medical evidence. The issue to be resolved is medical in nature and must be resolved with rationalized medical evidence. Appellant did not submit a narrative medical opinion from a physician addressing how specific employment factors, specifically any exposure to mold in his workplace, may have caused or aggravated his claimed conditions. Therefore, he did not meet his burden of proof.

On appeal, appellant's representative contends that appellant was adversely affected by a large amount of mold, as verified by multiple air quality reports. Appellant noted that when he was away from his workplace, his condition improved. The Board has held that the mere fact that his symptoms arise during a period of employment or produce symptoms revelatory of an underlying condition does not establish a causal relationship between his condition and his employment factors.<sup>4</sup> The Board finds that appellant has not submitted any medical evidence, as requested by OWCP, to establish a firm medical diagnosis causally related to factors of his federal employment. Therefore, the representative's argument is not substantiated.

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.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of FECA provides: "Before review under section 8128(a) of this title [relating to reconsideration], a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on [his] claim before a representative of the Secretary."<sup>5</sup>

Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."<sup>6</sup> The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the

---

<sup>3</sup> See *Solomon Polen*, 51 ECAB 341 (2000); *J.L.*, Docket No. 11-771 (issued November 17, 2011).

<sup>4</sup> See *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

<sup>5</sup> 5 U.S.C. § 8124(b)(1).

<sup>6</sup> 20 C.F.R. § 10.615.

date of the decision for which a hearing is sought.<sup>7</sup> OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>8</sup> In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.<sup>9</sup>

### **ANALYSIS -- ISSUE 2**

Following the issuance of OWCP's December 28, 2010 decision, appellant had 30 days from the date of issuance of that decision to request an oral hearing before an OWCP hearing representative. The 30-day computation begins with December 29, 2010. Thirty days from December 29, 2010 is January 27, 2011. Appellant's request was received by OWCP on February 9, 2011. But even considering the postmark date of January 28, 2011, his request is untimely.

Appellant was not entitled to an oral hearing as a matter of right under section 8124(b)(1) of FECA. Exercising its discretion to grant an oral hearing, OWCP denied his request on the grounds that he could equally well address any issues in his case by requesting reconsideration. Because reconsideration exists as an alternative appeal right to address the issues raised by OWCP's December 28, 2010 decision, the Board finds that OWCP did not abuse its discretion in denying appellant's untimely request for an oral hearing.<sup>10</sup>

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty causally related to factors of his federal employment. The Board further finds that OWCP properly denied his request for an oral hearing.

---

<sup>7</sup> *Id.* at § 10.616(a).

<sup>8</sup> *G.W.*, Docket No. 10-782 (issued April 23, 2010). *See also Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>9</sup> *Id.* *See also Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>10</sup> *See Gerard F. Workinger*, 56 ECAB 259 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 24, 2011 and December 28, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 3, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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