

FACTUAL HISTORY

On September 1, 2010 appellant, then a 60-year-old claims representative, filed an occupational disease claim alleging that he sustained a respiratory illness due to toxic black mold exposure. He became aware of his condition on July 1, 2010 and realized its relationship to his employment on August 27, 2010. Appellant did not incur any lost time from work.

A September 25, 2009 indoor air quality survey report prepared by a U.S. Department of Health and Human Services inspector revealed mold contamination and musty odors near the windows and on the perimeter walls of the employing establishment's field office. Previous testing conducted by a local consulting firm confirmed the presence of *Stachybotrys* and indicated acceptable airborne levels. The inspector pointed out that the employees complained of frequent headaches, sneezing, coughing and sinus infections.

In an undated statement, appellant's supervisor detailed that June and September 2009 testing showed that mold at the worksite did not enter the heating, ventilation and air conditioning system and was otherwise insufficient in quantity to pose significant health hazards. She also noted a high percentage of employee absenteeism.

OWCP informed appellant in an October 8, 2010 letter that additional evidence was needed to establish his claim. It gave him 30 days to submit a medical report from a physician explaining how industrial exposure to mold led to his respiratory condition. Appellant provided a second copy of the September 25, 2009 indoor air quality survey report.

By decision dated December 28, 2010, OWCP denied appellant's claim, finding that he failed to submit any medical evidence demonstrating that the accepted occupational exposure caused or contributed to a diagnosed respiratory illness.

Appellant's representative mailed a request for an oral hearing, which was postmarked January 28, 2011. By decision dated February 24, 2011, OWCP denied the application on the grounds that it was not made within 30 days after the issuance of the December 28, 2010 merit decision. After considering whether to grant a discretionary hearing, OWCP determined that the issue could be further addressed by requesting reconsideration and submitting additional evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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 FECA, that the claim was timely filed within the applicable time limitation period, that an injury was sustained in the performance of duty as alleged and that any disabilities and/or specific conditions for which compensation is claimed are causally related to

the employment injury.² 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.³

Whether an employee actually sustained an injury in the performance of duty begins with an analysis of whether fact of injury has been established.⁴ To establish fact of injury in an occupational disease claim, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁵

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's 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, 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.⁶

ANALYSIS -- ISSUE 1

The case record supports that appellant was exposed to mold on the job. Nonetheless, he failed to submit any medical reports from a qualified physician when he initially filed his occupational disease claim on September 1, 2010. In its October 8, 2010 letter, OWCP requested that appellant furnish medical evidence explaining how his work exposure contributed to a diagnosed condition. Appellant did not submit responsive evidence. Because no medical evidence was offered to show that the accepted industrial exposure was causally related to a diagnosed condition, appellant failed to establish his *prima facie* claim for compensation.⁷

Appellant contends on appeal that he continues to experience respiratory symptoms as a direct result of his prolonged exposure. As noted, however, he failed to provide any medical evidence supporting causal relationship which would establish his claim.

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁴ *See S.P.*, 59 ECAB 184, 188 (2007).

⁵ *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *R.R.*, Docket No. 08-2010 (issued April 3, 2009).

⁶ *I.J.*, 59 ECAB 408 (2008); *Woodhams*, *supra* note 3.

⁷ *See Donald W. Wenzel*, 56 ECAB 390 (2005).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that a claimant for compensation who is 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 his claim before a representative of the Secretary.⁸ A claimant is afforded the choice of either an oral hearing or a review of the written record.⁹ While a claimant is no longer entitled to an oral hearing or a review of the written record as a matter of right if his request is filed past the 30-day period, OWCP may grant the request within its discretionary power and must exercise that discretion.¹⁰

ANALYSIS -- ISSUE 2

Appellant's representative filed his request for an oral hearing on January 28, 2011,¹¹ more than 30 days after OWCP issued its December 28, 2010 decision.¹² Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.¹³ Because the application was not timely filed, appellant was not entitled to an oral hearing.

OWCP has the discretionary power to grant an oral hearing when a claimant is not entitled to one as a matter of right. It exercised this discretion in its February 24, 2011 decision, finding that appellant's issue could be addressed by requesting reconsideration and submitting additional evidence. This basis for denying his request for a hearing is a proper exercise of OWCP's authority.¹⁴ Accordingly, the Board finds that OWCP properly denied appellant's request for an oral hearing.

Appellant may submit new evidence or argument as part of a formal 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.

⁸ 5 U.S.C. § 8124(b)(1); *Joseph R. Giallanza*, 55 ECAB 186, 190-91 (2003).

⁹ 20 C.F.R. § 10.615.

¹⁰ See *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

¹¹ Under OWCP's regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. 20 C.F.R. § 10.616(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

¹² The 30-day time period for determining the timeliness of appellant's request for an oral hearing or review commences on the first day following the issuance of OWCP's decision. See *John B. Montoya*, 43 ECAB 1148, 1151-52 (1992); *Donna A. Christley*, 41 ECAB 90, 91 (1989). As OWCP's decision was issued December 28, 2010, the 30-day period for requesting an oral hearing began to run on December 29, 2010 and the last or 30th day was Thursday, January 27, 2011.

¹³ *William F. Osborne*, 46 ECAB 198 (1994).

¹⁴ *Mary B. Moss*, 40 ECAB 640, 647 (1989).

CONCLUSION

The Board finds that appellant did not establish that he sustained an occupational disease in the performance of duty and that OWCP properly denied his request for an oral hearing as untimely.

ORDER

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

Issued: February 9, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board