

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

M.M., Appellant

and

**SOCIAL SECURITY ADMINISTRATION,
Ironton, OH, Employer**

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**Docket No. 11-1509
Issued: February 1, 2012**

Appearances:
Rick W. Hanna, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 14, 2011 appellant, through her representative, filed a timely appeal of the Office of Workers' Compensation Programs' December 28, 2010 merit decision denying her occupational disease claim and February 24, 2011 nonmerit decision denying her request for an oral hearing as untimely filed. 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.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty causally related to factors of her federal employment; and (2) whether OWCP properly denied her request for an oral hearing as untimely.

On appeal, appellant's representative contends that air quality reports of record are sufficient to establish that appellant's exposure to mold while working at the employing establishment caused her respiratory and sinus conditions.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 30, 2010 appellant, then a 52-year-old claims representative, filed an occupational disease claim alleging that her chronic sinus infections, sore throat, difficulty breathing, chest pains, dizziness, headaches and severe fatigue were caused by her exposure to mold at the employing establishment. She also alleged that her workplace exposure aggravated her preexisting asthma and caused permanent lung damage. Appellant became aware of her conditions on March 1, 2007 and realized they were employment related on July 30, 2010.

A September 25, 2009 report from the employing establishment provided the results of environmental studies performed on September 15, 2009 to assess indoor air quality in appellant's office building. It noted that mold, a musty-type odor and poor air ventilation were found in several locations in the building. The employer also noted recommendations to remedy these conditions. An October 23, 2009 final report set forth deadlines to correct the conditions found in the September 25, 2009 report.

In an undated narrative statement, Bette L. Backus, a district manager, contended that, although testing of samples in 2009 revealed the presence of mold inside appellant's office building, it was not in sufficient quantities to present health hazards. She stated that power washing was the best source of action to alleviate the mold on the exterior of the building. Ms. Backus advised that air quality testing did not reveal any mold spores in the heating, ventilating or air conditioning system. She contended that there was no evidence to establish that appellant's own recurring cough and rash on her face were due to mold. Ms. Backus concluded that the Ohio River Valley was notorious for having a high number of allergens.

By letter dated October 13, 2010, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested that she submit medical evidence, including a rationalized medical opinion from an attending physician which described a history of injury and provided dates of examination and treatment, findings, test results, a diagnosis together with medical reasons on how the claimed work exposure contributed to the diagnosed condition. Appellant was afforded 30 days to submit the requested evidence. She did not respond.

In a December 14, 2010 decision, OWCP denied appellant's claim, finding that she failed to submit any medical evidence establishing a causal relationship between a medical condition and the accepted employment-related exposure.

By letter dated December 16, 2010, OWCP advised appellant that it had vacated the December 14, 2010 decision. It stated that her claim should have been reviewed by a claims examiner who handled claims involving mold exposure in her building. Appellant's claim would be reviewed and readjudicated by an appropriate claims examiner who would subsequently issue a formal decision on her claim.

In a December 28, 2010 decision, OWCP again denied appellant's claim on the grounds that she failed to submit any medical evidence to establish that she sustained a medical condition due to the accepted work exposure.

In an appeal request form dated January 28, 2011, but postmarked January 31, 2011, appellant requested an oral hearing.

By decision dated February 24, 2011, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that it was untimely. It exercised its discretion and further denied her request on the basis that the issue in the case could be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered which established that she sustained an injury in the performance of duty.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA² has the burden of establishing the essential elements of her claim, including the fact that the individual is an employee of the United States within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.³ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁴

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) 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 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 a causal relationship is 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 nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁵ Neither the fact that a claimant's condition became apparent during a period of employment nor her belief that the condition was caused by her employment is sufficient to establish a causal relationship.⁶

² 5 U.S.C. §§ 8101-8193.

³ *Elaine Pendleton*, 40 ECAB 1143 (1989) C.S., Docket No. 08-1585 (issued March 3, 2009).

⁴ *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *Victor J. Woodhams*, *supra* note 4 at 351-52.

⁶ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

ANALYSIS -- ISSUE 1

OWCP accepted as factual that appellant was exposed to mold while working as a claims representative. While the work exposure is established, the Board finds that she failed to establish a causal relationship between any respiratory, sinus or physical fatigue and the accepted work exposure. OWCP's October 13, 2010 developmental letter specifically requested that appellant submit a rationalized medical opinion from her attending physician addressing whether the accepted work exposure contributed to the claimed injuries. Appellant did not submit any medical evidence in response to OWCP's request. The Board finds, therefore, that she failed to meet her burden of proof.⁷

On appeal, appellant's representative contended that the air quality reports of record are sufficient to establish that appellant's respiratory and sinus conditions were caused by the accepted work exposure. However, causal relationship is a medical question that can only be resolved by probative medical opinion evidence.⁸ Appellant did not submit any medical evidence addressing causal relation between the accepted work exposure and the claimed injuries. She failed to establish a *prima facie* claim.⁹

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 FECA¹⁰ provides that a claimant not satisfied with a decision of OWCP is entitled to a hearing before an OWCP hearing representative when the request is made within 30 days after issuance of an OWCP decision.¹¹ Under the implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to a hearing by writing to the address specified in the decision within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.¹² If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.¹³ However, when the request is not timely filed or when reconsideration has previously been requested, OWCP may

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

⁸ See *Paul Foster*, 56 ECAB 208 (2004).

⁹ See *supra* note 7.

¹⁰ 5 U.S.C. §§ 8101-8193.

¹¹ *Id.* at § 8124(b)(1).

¹² 20 C.F.R. § 10.616(a); *Tammy J. Kenow*, 44 ECAB 619 (1993).

¹³ *Teresa M. Valle*, 57 ECAB 542 (2006).

within its discretion, grant a hearing or review of the written record and must exercise this discretion.¹⁴

ANALYSIS -- ISSUE 2

On December 28, 2010 OWCP denied appellant's occupational disease claim. Appellant's request for an oral hearing before OWCP's hearing representative was postmarked on January 31, 2011. The date of her hearing request is determined by the date of the postmark.¹⁵ As appellant's January 31, 2011 hearing request was made more than 30 days after the date of OWCP's December 28, 2010 decision, she was not entitled to a hearing as a matter of right under section 8124(b)(1) of FECA.

OWCP, however, has the discretionary authority to grant a hearing if the request was not timely filed. In its February 24, 2011 decision, it considered the issue involved and properly exercised its discretion when it denied appellant's hearing request and determined that she could equally well address the issue of whether she sustained an injury in the performance of duty by requesting reconsideration and submitting new evidence. The Board has held that the only limitation on OWCP's authority is reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.¹⁶ In the present case, OWCP did not abuse its discretion in denying a discretionary hearing and properly denied appellant's untimely request for an oral hearing under section 8124 of FECA.¹⁷

CONCLUSION

The Board finds that appellant has failed to establish that she sustained an injury in the performance of duty causally related to factors of her federal employment. The Board further finds that OWCP properly denied her request for an oral hearing as untimely.

¹⁴ *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

¹⁵ 20 C.F.R. § 10.616(a); *N.M.*, 59 ECAB 511 (2008).

¹⁶ *Teresa M. Valle*, *supra* note 13; *Daniel J. Perea*, 42 ECAB 214 (1990).

¹⁷ *See Herbert Jones, Jr.*, 57 ECAB 467 (2006); *D.F.*, Docket No. 11-42 (issued August 1, 2011).

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 1, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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