

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

J.O., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HEALTH ADMINISTRATION,
Fort Dodge, KS, Employer**

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**Docket No. 11-1269
Issued: January 19, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 22, 2011 appellant filed a timely appeal from the March 11, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for further merit review of her claim. She also timely appealed an October 25, 2010 decision which denied her claim for an injury in the performance of duty. 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 has met her burden of proof to establish that she sustained an injury in the performance of duty; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 8, 2010 appellant, then a 37-year-old patient services assistant, filed an occupational disease claim alleging that she sustained headaches, stuffy nose, burning in her lungs and a tickle in the back of her throat in the performance of duty. She first became aware of her condition and its relation to her work on March 11, 2010. Appellant did not stop work.

In letters dated April 26, 2010, OWCP requested additional factual and medical evidence from appellant and the employing establishment. In a May 1, 2010 statement, appellant noted that she was exposed to air contaminated with mold spores at the employing establishment for eight hours a day since the start of her employment. Once she was removed from the building, her symptoms were alleviated.

By decision dated May 25, 2010, OWCP denied appellant's claim finding that she had failed to submit medical evidence in support of her claim.

In a letter dated May 25, 2010, Rosetta Hubbard, a supervisor, noted that the employing establishment concurred with appellant's allegations. Appellant was exposed from 2009 up to March 11, 2010. Afterwards, all staff were moved to minimize the effects of exposure. OWCP received numerous environmental studies, mold reports and a position description.

On June 16, 2010 appellant requested reconsideration.² She stated that at the time she filed her claim, the air quality studies were not available; but the studies she obtained revealed two kinds of mold. As a result of her exposure, appellant experienced sinus discomfort, dryness in her sinuses, headache, burning eyes, itchy throat and just not feeling right. Appellant noted that she did not have any health issues prior to her exposure, which she became aware of on March 11, 2010.

In a telephone memorandum dated June 30, 2010, OWCP acknowledged that the May 25, 2010 decision was issued prematurely and a new decision would be issued once additional evidence was reviewed.

By decision dated July 7, 2010, OWCP denied appellant's claim finding that she failed to submit medical evidence in support of her claim.

On August 11, 2010 appellant requested reconsideration. She reiterated her belief that her condition was work related.

In support of her request, appellant submitted nursing notes dated July 8 and August 2, 2010, and progress notes from January 2009 to August 2010 that were either unsigned or from a nurse practitioner. She also submitted a July 30, 2010 laboratory report, an article on formaldehyde exposure, a record of telephone calls and an August 5, 2010 work restriction from a nurse practitioner. A July 16, 2010 chest x-ray read by Dr. Rajesh Gogia, a Board-certified diagnostic radiologist, revealed clear lungs.

² The date indicated 2009; however this appears to be a typographical error.

By decision dated October 25, 2010, OWCP denied appellant's claim finding that she failed to submit medical evidence in support of her claim.

On February 23, 2011 appellant requested reconsideration.

In a statement received on March 2, 2011, appellant reiterated her belief that her condition was work related. She noted that she had incurred medical expenses as a result. OWCP also received several nurse's notes dating from November 16, 2009 to August 30, 2010 and e-mail correspondence pertaining to running laboratory tests.

By decision dated March 11, 2011, OWCP denied appellant's request for reconsideration finding that she failed to submit either new and relevant evidence or legal contentions not previously considered.

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 of FECA, that an injury was sustained 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 upon 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 causal relationship, generally, 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

³ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ *Id.*

ANALYSIS -- ISSUE 1

Appellant alleged that she was exposed to air contaminated with mold spores at the employing establishment. The employing establishment confirmed that she was exposed to mold while at work. OWCP found that the claimed employment factor -- exposure to air contaminated with mold spores at work -- occurred. Appellant has established that she was exposed to air contaminated with mold spores, as alleged. However, she has not submitted sufficient medical evidence to establish that such exposure caused or contributed to her claimed medical conditions.

Appellant did not submit any evidence from a physician explaining how being exposed to air contaminated with mold spores at the employing establishment caused or contributed to any lung or breathing condition. OWCP advised appellant of the need to provide medical evidence addressing this aspect of her claim; but there is no report from a physician addressing how mold exposure at work caused any diagnosed medical condition.

Appellant provided a July 16, 2010 x-ray report from Dr. Gogia. The report merely noted findings but did not contain any opinion regarding the cause of her claimed condition. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.⁶ Appellant did not submit a medical report from a physician that explained how specific exposures in her federal employment caused or aggravated her diagnosed condition.

The record also contains progress notes and treatment reports from nurse practitioners. Health care providers such as nurses, acupuncturists, physician's assistants, and physical therapists are not physicians as defined under FECA. Their opinions on causal relationship do not constitute probative medical evidence and have no weight or probative value.⁷

Although appellant submitted an article on formaldehyde exposure this is also insufficient to establish her claim. The Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing causal relationship as they are of general application and are not determinative of whether the specific condition claimed was causally related to the particular employment factors alleged.⁸

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.⁹ Neither the fact that the condition became apparent during a period of employment nor the belief that the condition was caused or aggravated by employment factors or incidents is sufficient to

⁶ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁷ *Jane A. White*, 34 ECAB 515, 518 (1983). See 5 U.S.C. § 8101(2).

⁸ *D.E.*, 58 ECAB 448 (2007).

⁹ See *Joe T. Williams*, 44 ECAB 518, 521 (1993).

establish causal relationship.¹⁰ Causal relationship must be substantiated by reasoned medical opinion evidence, which is appellant's responsibility to submit.

There is no probative, rationalized medical evidence addressing or explaining how appellant's exposure to air contaminated with mold spores caused and/or aggravated a medical condition. She has not substantiated her claim.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹¹ OWCP's regulations provide that a claimant's application for reconsideration must be submitted in writing and set forth arguments or contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹² To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.¹³ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁴

ANALYSIS -- ISSUE 2

In the present case, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; nor has she advanced a relevant legal argument not previously considered by OWCP. The evidence she submitted is not pertinent to the underlying issue in this appeal, which is medical in nature, whether she has established an injury in the performance of duty.

Appellant requested reconsideration on February 23, 2011 and reiterated her belief that her condition was work related. She also noted that she had incurred expenses as a result. Appellant also provided several nursing notes dated from November 16, 2009 to August 30, 2010 and e-mail correspondence pertaining to running laboratory tests. The Board notes this evidence is not relevant to the underlying issue regarding an occupational disease arising on or about March 11, 2010. As noted, the issue of causal relation is medical in nature. The reports from the nurse do not constitute medical evidence under section 8101(2). Additionally, the e-mail correspondence and stated her belief that her condition is work related is not relevant as it is not medical evidence. The Board has held that the submission of evidence which does not

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8128(a). Under section 8128(a) of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

¹² 20 C.F.R. §§ 10.609(a) and 10.606(b).

¹³ *Id.* at § 10.607(a).

¹⁴ *Id.* at § 10.608(b).

address the particular issue involved in the case does not constitute a basis for reopening the claim.¹⁵

Appellant did not submit evidence or argument showing that OWCP erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent new evidence not previously considered by OWCP. It properly denied her reconsideration request.

On appeal, appellant noted that she submitted medical evidence which was signed by her physician. Additionally, she noted that her physician worked with the nurse. But the record does not contain medical reports from a physician. The reports from appellant's nurse cannot be considered medical evidence. Appellant also provided a new report from her physician. However, the Board has no jurisdiction to review this evidence for the first time on appeal.¹⁶

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of the 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 has not met her burden of proof in establishing that she sustained an injury in the performance of duty. The Board further finds that OWCP properly denied her request for reconsideration.

¹⁵ See *David J. McDonald*, 50 ECAB 185 (1998).

¹⁶ 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2011 and October 25, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 19, 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