

On appeal appellant's representative contends that appellant was adversely affected by a large amount of mold verified by multiple air quality reports at her workplace. He further contends that when she is away from her workplace her condition improves and as soon as she returns her various health problems recur.

FACTUAL HISTORY

On August 30, 2010 appellant, then a 39-year-old social insurance representative technical expert, filed an occupational disease claim (Form CA-2), alleging that she experienced repeated colds and respiratory infections with breathing difficulties, sore throat, stuffy nose, itchy eyes/face, chest pain and tightness without infection, dizziness, headaches, and severe fatigue and malaise/body aches as a result of exposure to *Stachybotrys* mold in her workplace. She became aware of her condition on February 15, 2000 and realized it was causally related to her federal employment on July 30, 2010 after she received a report from a union representative regarding mold in the workplace.

In a statement received by OWCP on September 24, 2010, appellant's supervisor noted that test results showed that mold was present but not in sufficient quantities to present health hazards. She stated that action had been taken to contain the mold and that air testing to date did not establish that mold spores were present in the heating, ventilation or air conditioning (HVAC) system. The supervisor reported that appellant had a recurring cough and a rash on her face and indicated that 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 that could possibly be suspect mold induced 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 the suspect 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 were no complaints to date 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 suspect 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 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; (6) and assure compliance of relative humidity levels.

By letter dated October 8, 2010, OWCP notified appellant that the evidence submitted was not sufficient to establish her claim. It requested additional factual and medical evidence and allotted 30 days for appellant to submit additional evidence.

By decision dated December 28, 2010, OWCP denied appellant's claim finding that the medical evidence submitted was insufficient to establish fact of injury. Although the described employment exposure occurred as alleged, the medical evidence provided no firm diagnosis or established causal relationship.

By letter postmarked January 28, 2011, appellant, through her representative, requested an oral hearing.

By decision dated February 24, 2011, OWCP denied appellant's request for an oral hearing finding that her request was untimely as 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 an employee 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. Appellant must also establish that such event, incident or exposure caused an injury.²

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

² 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.³

ANALYSIS -- ISSUE 1

It is not disputed that appellant was exposed to mold at her place of work. The Board finds that she has not submitted sufficient medical evidence to establish a firm diagnosis or causal relationship to the implicated employment factors. Appellant submitted a September 25, 2009 air quality survey report that documented the presence of mold in the workplace. The question is whether causal relationship is established.⁴ The Board finds that appellant did not submit any medical evidence from a physician addressing how any mold in her workplace caused or aggravated her claimed conditions. Appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty causally related to factors of her federal employment.

On appeal appellant's representative contends that appellant was adversely affected by a large amount of mold, as verified by the air quality reports, at her workplace. He stated that when she is away from her workplace her condition improves and when she returns her health problems reoccur. The Board has held that the mere fact that appellant's symptoms arise during a period of employment or produce symptoms revelatory of an underlying condition does not establish a causal relationship between her condition and her employment factors.⁵ There is no evidence from a physician addressing the issue of causal relation. The Board finds that the evidence of record is insufficient to establish a firm medical diagnosis or causal relation. 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 [her] claim before a representative of the Secretary."⁶

Section 10.615 of Title 20 of the Code of Federal Regulations provide, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose

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

⁴ See *Paul Foster*, 56 ECAB 208 (2004).

⁵ See *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁶ 5 U.S.C. § 8124(b)(1).

between two formats: An oral hearing or a review of the written record.”⁷ The hearing request must be sent 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.⁸ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.⁹ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.¹⁰

ANALYSIS -- ISSUE 2

Appellant had 30-calendar days from OWCP’s December 28, 2010 decision, or until January 27, 2011, to request an oral hearing. Because her request was postmarked January 28, 2011, her request was 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 appellant’s request on the grounds that she could equally well address any issues in her 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.¹¹

CONCLUSION

The Board finds that appellant has not met her burden of proof 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 appellant’s request for an oral hearing as untimely.

⁷ 20 C.F.R. § 10.615.

⁸ *Id.* at § 10.616(a).

⁹ *G.W.*, Docket No. 10-782 (issued April 23, 2010). *See also Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁰ *Id.* *See also Rudolph Bermann*, 26 ECAB 354 (1975).

¹¹ *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: January 23, 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