United States Department of Labor
Employees' Compensation Appeals Board

H.W., Appellant	)	
and	)	**Docket No. 11-1335**
	)	**Issued: March 1, 2012**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Fort Worth, TX, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 10, 2011 appellant, through his attorney, filed a timely appeal of a March 14, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied a period of disability. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish disability for the period August 9 to 30, 2010 as a result of his employment-related aggravation of acute asthmatic bronchitis.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 28, 2009 appellant, then a 47-year-old information technology specialist, filed an occupational disease claim alleging that he was exposed to mold in the performance of his duties. On September 29, 2008 he became aware of his disease or illness. Appellant initially stopped work on March 30, 2009 and returned on April 27, 2009. The employing establishment noted that he was moved to a new work area. It also provided an April 6, 2009 mold summary report documenting the presence of mold in appellant's work area. On June 15, 2009 OWCP accepted the claim for acute aggravation of acute asthmatic bronchitis.[2]

In a June 24, 2009 report, Dr. John Dang, a Board-certified internist, advised that appellant could return to work. He provided restrictions which included no exposure to molds. Appellant was subsequently placed in the vocational rehabilitation program until the employing establishment could be cleared and retested for mold. He received appropriate compensation.

In a report dated August 5, 2009, an OWCP medical adviser opined that the accepted conditions should include acute asthma and reactive airway disease.

On October 1, 2009 the employing establishment notified OWCP and appellant that the worksite had been remediated and was deemed free of toxic mold. It confirmed that his office would be ready for occupancy as of October 13, 2009 and he was advised to report for duty on that date.

On October 9, 2009 the employing establishment premises was tested and found cleared of toxic mold. Appellant was cleared to return to work on October 9, 2009; however, he did not return to full duty until November 4, 2009.[3]

A January 25, 2010 chest computerized tomography (CT) scan read by Dr. Kristen P. Ethridge, a Board-certified diagnostic radiologist, revealed a widely patent airway and no parenchymal consolidations or pericardial or pleural effusion seen.

On July 20, 2010 appellant was seen by a physician's assistant for cough and breathing difficulty.

On August 11, 2010 appellant submitted a Form CA-7 claim requesting wage-loss compensation for disability from August 9 to 30, 2010.

In a report dated August 17, 2010, Dr. Dang noted that appellant was doing about the same and still coughing. He diagnosed mold inhalation and placed appellant off work. In an August 30, 2010 treatment note, Dr. Dang kept appellant off work. He stated that appellant was prevented from returning to work as he could have "no exposure to mold."

[2] The record reflects that appellant has a preexisting asthma condition.

[3] In an October 6, 2009 report, Dr. Hisham Bismar, a Board-certified internist, released appellant to work effective November 4, 2009. He explained that the medication must be out of his system before he returned to work.

By letter dated October 5, 2010, OWCP informed appellant of the evidence needed to support his claim and requested that he submit additional evidence within 30 days.

In an October 6, 2010 report, Dr. Bismar noted that he examined appellant on August 5, 2010. The findings included dry cough, headaches, tightness in the chest and sinus problems. Dr. Bismar noted that appellant was treated with a course of prednisone and removed from work until the condition improved and clean air samples were received. He explained that appellant had reactive airway disease which could be "aggravated by any lung irritants." Dr. Bismar placed appellant off work until further notice.

An indoor microbial assessment was conducted by Texas Mold Inspection Service (TXMIS) on October 15, 2010. It reported findings of "no moisture sources observed and mold spore elevations are considered insignificant." TXMIS noted that a sample from appellant's office contained a spore count of Chaetomium +19. It noted that the spore elevation fell within the industry guideline acceptance and was considered insignificant.

In a November 29, 2010 statement, appellant noted that the safety inspection revealed that toxic molds remained in his workplace. He alleged that the only air samples taken were obtained during the removal process in the contained affected areas which were sealed in plastic with an air scrubber running days prior to the testing. Appellant contended that the recent air samples showed that toxic molds were still present in the work area.

On November 18, 2010 Dr. Bismar opined that, even though the work environment showed acceptable levels, because of his reactive airway disease, appellant would be "super sensitive to even insignificant level of any lung irritant."

By decision dated December 1, 2010, OWCP denied appellant's claim for compensation finding that the medical evidence failed to establish that he was disabled for work for the period August 9 to 30, 2010 as a result of the accepted work injury. It found that he had a lifelong asthma condition and the air samples revealed that the area was cleared of toxic mold.

On December 13, 2010 appellant requested a review of the written record. In a letter dated December 13, 2010, he stated that his physician, Dr. Bismar, removed him from duty on August 5, 2010. Appellant explained that he was removed from the work environment due to the fact that it contained mold.

In a December 2, 2010 report, Dr. Bismar noted that appellant reported ongoing mold inhalation and reactive coughing as well as chest pain. He opined that appellant had a continuing work-related health problem due to mold inhalation.

In a January 16, 2011 report, Dr. Bismar noted that appellant's chest x-rays, pulmonary function test and treatment with an inhalation nebulizer were all routine. He placed appellant off work. Dr. Bismar continued to treat appellant and place him off work.

By decision dated March 14, 2011, an OWCP hearing representative affirmed the prior decision. The hearing representative expanded the claim to include acute asthma and reactive airway disease.

LEGAL PRECEDENT

Under FECA, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.[4] Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[5]

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.[6] The Board has stated that, when a physician's statements regarding an employee's ability to work consists only of a repetition of the employee's complaints that he or she hurt too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[7] The Board has held that a medical opinion not fortified by medical rationale is of little probative value.[8]

ANALYSIS

Appellant alleged that he was totally disabled for intermittent periods August 9 to 30, 2010. He alleges that the employing establishment had mold, which aggravated his acute asthmatic bronchitis such that he was unable to work. The Board finds, however, that appellant failed to submit probative medical evidence demonstrating total disability for this period of time due to his accepted conditions.

Appellant submitted reports from Dr. Bismar and Dr. Dang. On October 6, 2010 Dr. Bismar who noted that he examined appellant on August 5, 2010. His findings included dry cough, headaches, tightness in the chest and sinus problems. Appellant was treated with a course of prednisone and removed from work until the condition improved and clean air samples were received from the employing establishment. Dr. Bismar explained that appellant had reactive airway disease which could be "aggravated by any lung irritants" and placed him off work. The Board notes that the indoor microbial assessment conducted by TXMIS on October 15, 2010 revealed "no moisture sources observed and mold spore elevations are considered insignificant." It also found that a sample taken from appellant's office contained a spore count of Chaetomium +19 which was considered insignificant. The Board finds that Dr. Bismar's opinion that

[4] *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[5] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[6] *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

[7] *John L. Clark*, 32 ECAB 1618 (1981).

[8] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954).

appellant's lung condition could be "aggravated by any lung irritants" is equivocal and not fully rationalized. The Board has held that speculative and equivocal medical opinions regarding causal relationship have little probative value.[9] Dr. Bismar did not provide sufficient medical reasoning explaining why a documented level of a particular workplace substance would have caused or aggravated appellant's accepted condition. On November 18, 2010 he opined that even though the work environment showed acceptable levels because of his reactive airway disease, appellant would be super sensitive to even an insignificant level of any lung irritant. Dr. Bismar did not provide any reasoning for his opinion on causal relationship. This is particularly important where the evidence indicates that appellant has a preexisting asthma condition.

In reports dated December 2, 2010 and January 16, 2011, Dr. Bismar noted that appellant reported continuing mold inhalation and reactive coughing as well as chest pain from coughing. As noted above, the mold was found to be at insignificant levels. Dr. Bismar opined that appellant had a continuing work-related health problem due to mold inhalation. He did not explain how he arrived at this conclusion or indicate that appellant was disabled for work during the period August 9 to 30, 2010. The Board has held that a medical opinion not fortified by medical rationale is of little probative value.[10] Furthermore, in his January 16, 2011 report, Dr. Bismar noted that appellant's chest x-rays, pulmonary function test and treatment with an inhalation nebulizer were all routine.

In reports dated August 17 and 30, 2010, Dr. Dang diagnosed mold inhalation and placed appellant off work. In his August 30, 2010 treatment note, he indicated that appellant was prevented from returning to work as he could have "no exposure to mold." As noted above, the mold findings were minimal or insignificant. Without an explanation as to how these minimal or insignificant mold levels could cause or contribute to disability, these reports are of limited probative value.

The Board also notes that the record contains additional medical evidence such as diagnostic reports; however, none of the other reports specifically attributed appellant's disability from work commencing August 9 to 30, 2010, to his accepted employment injuries.

Although appellant alleged that his disability commencing from August 9 to 30, 2010, was due to his accepted employment injury, the medical evidence of record does not establish that his claimed disability during the time frame was related to his accepted employment injuries. The Board finds that he has failed to submit rationalized medical evidence establishing that his disability for the period August 9 to 30, 2010, was causally related to his accepted employment injury and thus, he has not met his burden of proof.

[9] *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal; the opinion should be expressed in terms of a reasonable degree of medical certainty).

[10] *Michael E. Smith*, 50 ECAB 313 (1999); *Annie L. Billingsley*, 50 ECAB 210 (1998).

CONCLUSION

The Board finds that appellant failed to establish that he was disabled for the period commencing from August 9 to 30, 2010, as a result of his employment-related aggravation of acute asthmatic bronchitis.[11]

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 2012
Washington, DC

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

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

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

[11] Appellant may submit evidence or argument with a written request for reconsideration 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.