

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

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S.M., Appellant )

and )

DEPARTMENT OF HOMELAND SECURITY, )  
TRANSPORTATION SECURITY )  
ADMINISTRATION, Lihue, HI, Employer )

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**Docket No. 12-977  
Issued: October 9, 2012**

*Appearances:*  
*Appellant, pro se*  
*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 March 30, 2012 appellant filed a timely appeal of the January 11, 2012 decision of the Office of Workers' Compensation Programs (OWCP) which denied her claim for an occupational disease. She also appealed a March 2, 2012 decision of OWCP which denied merit review. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUES**

The issues are: (1) whether appellant met her burden of proof to establish that she developed an occupational disease in the performance of duty; and (2) whether OWCP properly denied her request for reconsideration under 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

On November 3, 2011 appellant, then a 36-year-old transportation security officer, filed an occupational disease claim alleging nausea, headaches, dizziness, fatigue and a numb tongue two hours after beginning duty. She became aware of her condition on November 3, 2011 and realized it was causally related to her work on that date. Appellant did not stop work.

On November 18, 2011 OWCP advised appellant of the evidence needed to establish her claim. It requested that she submit a physician's reasoned opinion addressing the relationship of her claimed condition and specific work factors.

In a November 26, 2011 statement, appellant noted that on November 3, 2011 she and 10 coworkers were exposed to a chemical at the main checkpoint at work. She experienced fatigue, dizziness, headaches and nausea with tongue numbness. Appellant stated that her supervisors shut down the checkpoint and evacuated all employees and passengers. After an emergency room physician instructed her to stay home from work for a few days, she slept almost the entire time.

Appellant submitted a November 3, 2011 report from Dr. Evan W. Lee, an osteopath, who treated her for a multitude of vague complaints including headaches, dizziness, tongue numbness and drowsiness. She reported having a work break at 4:30 p.m. and becoming drowsy. Appellant returned to work and reported her symptoms to her supervisor. Dr. Lee noted that appellant arrived at the hospital with 11 other individuals from the airport after concerns of possible chemical exposure from an unknown source. He diagnosed dizziness, headaches and possible exposure to chemical compounds. In discharge instructions, Dr. Lee diagnosed nausea, dizziness, headache and exposure to a chemical compound. In a November 3, 2011 medical excuse form, he noted that appellant was disabled from November 5 to 7, 2011.

Dr. Lisa S. Splittstoesser, a Board-certified internist, submitted reports dated November 14 and December 1, 2011. She treated appellant in follow up for headaches, nausea and dizziness experienced at work on November 3, 2011. Appellant reported that 10 of her coworkers experienced similar symptoms. Her headaches, nausea and dizziness resolved but she felt fatigued since the incident and developed a rash on her wrists. Appellant noted a history of recurrent hives related to her existing stress condition and post-traumatic stress disorder. Dr. Splittstoesser diagnosed fatigue, rash possibly related to recent stress and paresthesia. On December 1, 2011 she reported that appellant's fatigue, headaches, nausea and dizziness had resolved but she continued to have numbness on her tongue. Appellant returned to work and was able to eat and swallow without difficulty. Dr. Splittstoesser noted that the physical examination revealed no facial asymmetry, no sensory deficits of the face and the tongue appeared to move normally. She diagnosed paresthesia of tongue and was unsure of the etiology of the symptoms although, given the timing, it was likely caused by whatever exposure occurred at work.

On January 11, 2012 OWCP denied appellant's claim finding the medical evidence insufficient to establish that a medical condition related to the claimed work factors.

On January 20, 2012 appellant requested reconsideration. She asserted that she was exposed to something at work and became ill. Appellant noted that her physician could not

provide a diagnosis and referred her to a neurologist. She still experienced numbness in her tongue. Appellant submitted a November 3, 2011 report from Dr. Lee and reports from Dr. Splittstoesser dated November 14 and December 1, 2011, previously of record.

By decision dated March 2, 2012, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant further merit review.

### **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 she sustained an injury in the performance of duty, she must submit sufficient evidence to establish that she 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.<sup>2</sup>

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 nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

Appellant and coworkers alleged exposure to an unidentified compound on November 3, 2011 while performing her duties. She was been diagnosed with nausea, dizziness, headache and paresthesia of the tongue. The Board finds that appellant has not submitted sufficient medical evidence to establish that her nausea, dizziness, headache or tongue paresthesia were causally related to her federal employment. Appellant did not submit a rationalized medical report from a physician addressing how any specific employment exposure caused or aggravated her claimed conditions.

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<sup>2</sup> 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).

<sup>3</sup> *Solomon Polen*, 51 ECAB 341 (2000).

In a November 3, 2011 report, Dr. Lee treated appellant for headaches, dizziness, tongue numbness and drowsiness. Appellant related her concerns of possible chemical exposure from an unknown source. In discharge instructions, Dr. Lee diagnosed nausea, dizziness, headache and exposure to a chemical compound and noted that appellant was disabled from November 5 to 7, 2011. The Board finds that Dr. Lee's reports do not address the issue of causal relationship. They are insufficient to establish the claimed nausea, dizziness or headache as causally related to her employment. Dr. Lee diagnosed nausea, dizziness and headache "possibly" related to exposure to an unknown chemical agent. This report provides only speculative support for causal relationship as the physician qualified his opinion on causal relation. Dr. Lee provided no medical reasoning to support his opinion on causal relationship. The reports of Dr. Lee are insufficient to meet appellant's burden of proof.<sup>4</sup>

In reports dated November 14 and December 1, 2011, Dr. Splittstoesser saw appellant in follow up and noted her symptoms of fatigue, headaches, nausea and dizziness had resolved but she continued to have a numb feeling on her tongue. She diagnosed paresthesia of tongue but stated that she was unsure how the symptoms related to exposure at work. Dr. Splittstoesser's reports do not adequately address causal relationship. They too, are insufficient to establish the claimed nausea, dizziness, headache as causally related to appellant's employment. Dr. Splittstoesser noted that she was unsure how to explain the symptoms but given the timing it was "likely" caused by an exposure at work. This report is speculative on causal relationship. Therefore, the reports of Dr. Splittstoesser are insufficient to meet appellant's burden of proof.<sup>5</sup>

The Board finds that the medical evidence does not establish that appellant developed nausea, dizziness, headache and paresthesia of the tongue causally related to her federal employment. The record does not specify and chemical agent to which she may have been exposed.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that her condition was caused, precipitated or aggravated by her employment is sufficient to establish causal relationship.<sup>6</sup> Causal relationships must be established by rationalized medical opinion evidence. OWCP properly found that appellant did not meet her burden of proof to establish her claim.

On appeal, appellant asserts that her diagnosed conditions of nausea, dizziness and headache were caused by her workplace exposure to chemicals. As stated, the medical evidence does not establish that her conditions were causally related to her employment. Reports from appellant's physician's failed to provide sufficient medical rationale explaining how her nausea, dizziness, headache and paresthesia conditions were causally related to her employment exposure.

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<sup>4</sup> Medical opinions that are speculative or equivocal in character are of diminished probative value. *D.D.*, 57 ECAB 734 (2006).

<sup>5</sup> *Id.*

<sup>6</sup> See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

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**

Under section 8128(a) of FECA,<sup>7</sup> OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law;  
or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”<sup>8</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.<sup>9</sup>

### **ANALYSIS -- ISSUE 2**

OWCP denied appellant’s claim for an occupational disease on the grounds that the evidence submitted was insufficient to establish that she developed nausea, dizziness, headache and paresthesia in the performance of duty. It denied her January 20, 2012 reconsideration request, without a merit review, and she appealed this decision to the Board. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim.

In her January 20, 2012 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. She indicated that she was exposed to something at work and became ill and her physician could not determine a diagnosis and referred her to a neurologist. Appellant indicated that she still experienced numbness in her tongue. However, her general statements and allegations did not show that OWCP erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by OWCP. Consequently,

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<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.606(b)(2).

<sup>9</sup> *Id.* at § 10.608(b).

appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by OWCP, appellant submitted a November 3, 2011 report from Dr. Lee and reports from Dr. Splittstoesser dated November 14 and December 1, 2011, all previously of record. The Board notes that these reports are duplicative of evidence previously of record and previously considered by OWCP in its decision dated January 11, 2012 and found to be insufficient. Therefore, this report is insufficient to require OWCP to reopen the claim for a merit review.<sup>10</sup> Therefore, OWCP properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish that her claimed conditions were causally related to her employment. The Board further finds that OWCP properly denied her request for reconsideration.

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<sup>10</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; *see Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 2 and January 11, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 9, 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