United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 13-256**
	)	**Issued: August 13, 2013**
SOCIAL SECURITY ADMINISTRATION, CHICAGO FIELD OFFICES, Chicago, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 6, 2012 appellant filed a timely appeal from the May 11, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) and the October 26, 2012 nonmerit decision of OWCP. 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 these decisions.[2]

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an allergic or pulmonary condition in the performance of duty; and (2) whether OWCP properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193.

[2] Appellant timely requested an oral argument before the Board. In a March 8, 2013 order, the Board exercised its discretion to deny appellant's request for oral argument noting that appellant's contentions on appeal could adequately be addressed in a decision based on the case record as submitted.

FACTUAL HISTORY

On January 5, 2011 appellant, then a 56-year-old retired manager, filed an occupational disease claim alleging that she sustained work-related conditions including aggravation of allergies, rosacea and constant coughing. Regarding the relationship of the claimed conditions to her employment, she stated, "I worked long hours in an office building with black mold visible at the seams of several pieces of wallpaper. One seam was within 15 feet of my desk." Appellant indicated that she first became aware of her claimed condition in May 2010 and that she first realized that it was caused or aggravated by her employment in July 2010. She stopped work on November 3, 2010 and retired effective that day.

In an accompanying statement, appellant stated that in approximately June 2009 she noticed a loosened wallpaper seam which looked black underneath. She indicated that an air quality engineer tested the air, but the findings of the test showed that there were no problems. Appellant stated that she asked the field services office to pursue the matter further and noted that another test performed by a contractor for the Public Health Service indicated that there was, in fact, black mold. The test showed that the mold was inside the southern and western walls of the building and that it occurred due to electrical receptacles being removed from the building. Appellant noted that, after the landlord failed to act, she placed clear duct tape on every seam possible. After the tape was applied, the mold became increasingly more visible at many different sites, including in a seam that was close to where she sat every day. Appellant indicated that in May 2010 she started having a dry, hacking cough. She described other conditions which she also believed were caused by the black mold at work, including rosacea on her face and increased allergic reactions.

In a February 4, 2011 letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim.

Appellant submitted an April 18, 2011 statement in which she continued to argue that she sustained allergic and pulmonary conditions due to exposure to mold at work.

In a March 29, 2011 decision, OWCP denied appellant's claim on the grounds that she did not submit sufficient factual and medical evidence to establish that she sustained an allergic or pulmonary condition in the performance of duty.

Appellant requested reconsideration of her claim and submitted a number of medical reports which she believed supported her claim for work-related allergic and pulmonary conditions. These reports, dated beginning in 2004, included lung capacity tests and allergic reaction tests which showed that she reacted to such allergens as trees, grass, feathers, dust mites and mold. In a March 15, 2011 report, Dr. Everett Gevedon, III, an attending Board-certified allergist, noted that allergy testing was accomplished without complications and revealed mild-to-moderate reactivity to mold and dust mites. There was also somewhat increased reactivity to grass, tree, ragweed and field weed pollen. Dr. Gevedon noted that appellant's test did show mold sensitivity, but not at a level that exceeded what was typically found in the allergic population. He stated, "Since she has developed symptoms from this, it would imply that she had a significant exposure at some point." Dr. Gevedon diagnosed several conditions including

allergic rhinitis, bronchial asthma, chronic serous otitis, deviated nasal septum and history of significant mold exposure.

Appellant also submitted the findings of a November 2010 evaluation of her workplace conducted in association with the General Services Administration. The report of the evaluation showed that there was visible mold in various parts along the perimeter wall, especially at the seams of the wallpaper. It was noted, however, that the sample results of indoor airborne mold appeared in an array of mold spores similar to those in the outdoor air. The report noted, "The total concentration of airborne mold spores was lower in the indoor air when compared to the results for the sample collected outdoors. These results, independent of visual observations, are not suggestive of an indoor mold growth condition."

In a July 18, 2011 decision, OWCP denied appellant's claim as modified to reflect that the factual aspect of the claim was clarified to establish that appellant was exposed to some level of mold in the workplace per the November 2010 evaluation. It was noted that this mold exposure was less than would have occurred outside the workplace. However, OWCP found that the medical evidence of record, including the opinion of Dr. Gevedon, did not show that appellant sustained a condition due to the accepted work factors.

Appellant submitted a number of diagnostic reports indicating that she was allergic to various substances including mold. In a January 31, 2012 report, Dr. Jonathan A. Bernstein, an attending Board-certified allergist, stated that appellant reported that there was visible mold in her workplace due to poor air circulation and humidity control. He noted that appellant started developing chronic upper respiratory infections in 2004 but did not initially relate to workplace conditions. However, appellant did report improved symptoms when away from the workplace. Dr. Bernstein stated:

> "Our evaluation indicates that she has nonallergic rhinitis and cough-variant asthma confirmed by methacholine challenge test. She has responded to avoidance measures and medication. It is my opinion based on her history and temporal relationship to exposures in the workplace and exclusion of other underlying conditions that her current condition was caused by chronic exposure to poor indoor air quality in the workplace. With continued avoidance and medications her prognosis is good."

In a May 11, 2012 decision, OWCP affirmed its July 18, 2011 decision denying appellant's claim for a work-related allergic or pulmonary condition. It indicated that the submitted medical evidence did not contain a rationalized medical opinion relating the claimed conditions to the accepted work factors.

In an October 10, 2012 letter, appellant requested reconsideration of her claim. She submitted the results of diagnostic testing conducted on October 31, 2011. In a September 27, 2012 letter, appellant's sister expressed her belief that appellant's health problems were due to exposure to black mold at work.

In an October 26, 2012 decision, OWCP denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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 specific condition for which compensation is claimed are causally related to the employment injury.[3] These are the essential elements of each 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.

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's reasoned opinion on whether there is a causal relationship between the claimant's diagnosed condition and the compensable 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]

ANALYSIS -- ISSUE 1

Appellant filed a claim alleging that she sustained allergic and pulmonary conditions due to exposure to mold in the workplace. OWCP accepted that she was exposed to some level

[3] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] *See Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990). A traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas an occupational disease refers to an injury produced by employment factors which occur or are present over a period longer than a single workday or work shift. 20 C.F.R. § 10.5(ee), (q); *Brady L. Fowler*, 44 ECAB 343, 351 (1992).

[5] *See Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

of mold in the workplace,[6] but found that she did not submit sufficient medical evidence to establish that she sustained the claimed conditions due to the accepted work factors.

The Board finds that appellant did not submit sufficient medical evidence to establish that she sustained an allergic or pulmonary condition due to the accepted work factors.

Appellant submitted reports, dated beginning in 2004, which included lung capacity tests and allergic reaction tests which showed that she reacted to such allergens as trees, grass, feathers, dust mites and mold. However, these reports did not contain any opinion that she sustained any specific condition due to her work environment. In a March 15, 2011 report, Dr. Gevedon, an attending Board-certified allergist, noted that allergy testing was accomplished without complications and revealed mild-to-moderate reactivity to mold and dust mites. He noted that appellant's test did show mold sensitivity, but not at a level that exceeded what was typically found in the allergic population. Dr. Gevedon stated, "Since she has developed symptoms from this, it would imply that she had a significant exposure at some point." He diagnosed several conditions including allergic rhinitis, bronchial asthma, chronic serous otitis, deviated nasal septum and history of significant mold exposure. Although Dr. Gevedon showed that appellant had some sensitivity to mold, he did not provide a specific opinion that appellant sustained a condition due to exposure to mold or other allergens at work. Therefore, his report does not establish appellant's claim.

In a January 31, 2012 report, Dr. Bernstein, an attending Board-certified allergist, stated that appellant reported that there was visible mold in her workplace due to poor air circulation and humidity control. He noted that his evaluation indicated that appellant had nonallergic rhinitis and cough-variant asthma confirmed by methacholine challenge test. Dr. Bernstein stated, "It is my opinion based on her history and temporal relationship to exposures in the workplace and exclusion of other underlying conditions that her current condition was caused by chronic exposure to poor indoor air quality in the workplace. With continued avoidance and medications her prognosis is good."

While Dr. Bernstein did provide an opinion on causal relationship, it is not a well-rationalized opinion. He appears to rely entirely on appellant's nonspecific statements regarding the level of mold in the workplace. Dr. Bernstein does not provide a detailed discussion of the accepted facts in the present case regarding mold in the workplace. Therefore, his opinion on causal relationship is not based on a complete and accurate factual basis and he did not adequately explain how the observed condition could be related to the accepted work factors in this claim. Dr. Bernstein did not provide a detailed explanation of how specific physical findings and results of diagnostic testing supported his opinion on causal relationship. The Board has held that the fact that a condition manifests itself or worsens during a period of employment[7] or that

[6] The findings of a November 2010 evaluation of appellant's workplace showed that there was visible mold in various parts along the perimeter wall especially at the seams of the wallpaper. It was noted, however, that the sample results of indoor airborne mold appeared in an array of mold spores similar to those in the outdoor air. The report noted, "The total concentration of airborne mold spores was lower in the indoor air when compared to the results for the sample collected outdoors. These results, independent of visual observations, are not suggestive of an indoor mold growth condition."

[7] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

work activities produce symptoms revelatory of an underlying condition[8] does not raise an inference of causal relationship between a claimed condition and employment factors. Therefore, Dr. Bernstein's opinion does not establish appellant's claim for a work-related allergic or pulmonary condition.[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.[10]

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by it; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[11] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[12] 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.[13] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[14] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[15] While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[16]

ANALYSIS -- ISSUE 2

OWCP issued a decision on May 11, 2012. Appellant requested reconsideration of this decision on October 10, 2012.

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[8] *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981).

[9] On appeal, appellant argued that the medical evidence established her claim, but she did not identify medical evidence which contained a rationalized opinion on causal relationship.

[10] Appellant submitted additional evidence after OWCP's October 26, 2012 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[11] 20 C.F.R. § 10.606(b)(2).

[12] *Id.* at § 10.607(a).

[13] *Id.* at § 10.608(b).

[14] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[15] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[16] *John F. Critz*, 44 ECAB 788, 794 (1993).

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 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 argued that the evidence of record showed that she had a work-related allergic condition. The underlying issue in this case was whether the medical evidence shows that appellant sustained an allergic condition due to work factors. That is a medical issue which must be addressed by relevant medical evidence.[17]

A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in this case. Appellant submitted the results of diagnostic testing conducted on October 31, 2011. This evidence is not relevant to the main issue of the present case because it does not contain a physician's opinion that the observed conditions were related to accepted work factors. In a September 27, 2012 letter, appellant's sister expressed her belief that appellant's health problems were due to exposure to black mold at work. However, such evidence would not be relevant to appellant's claim because it does not constitute probative medical evidence on the cause of her claimed condition.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). She 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 she sustained an allergic or pulmonary condition in the performance of duty. The Board further finds that OWCP properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[17] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

ORDER

IT IS HEREBY ORDERED THAT the October 26 and May 11, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 13, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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