

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

M.E., Appellant)

and)

DEPARTMENT OF THE ARMY, SPACE)
NAVAL WAR SYSTEM COMMAND CENTER,)
North Charleston, SC, Employer)

**Docket No. 13-1370
Issued: October 28, 2013**

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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 20, 2013 appellant filed a timely appeal from an April 2, 2013 decision of the Office of Workers' Compensation Programs (OWCP) which denied his claim for an occupational disease. He also appealed a May 6, 2013 decision of OWCP which denied his request for reconsideration without conducting a merit review. 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 merit and nonmerit decisions of the case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that he developed an occupational disease in the performance of duty; and (2) whether OWCP properly denied appellant's request for reconsideration.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On October 2, 2012 appellant, then a 45-year-old electronics technician, filed an occupational disease claim, alleging that he developed postnasal drip from constant exposure to burn pits, dust and particulates from frequent wind storms while deployed in Afghanistan. He became aware of his condition and realized it was causally related to his employment on May 14, 2011. Appellant did not stop work. He was last exposed to the conditions thought to have caused his condition on April 9, 2012.

In undated statements, appellant indicated that his duties as a space and naval warfare quality assurance evaluator required him to be deployed in Afghanistan for 159 days in 2011 and 100 days in 2012. He alleged that during his deployment he was constantly exposed to burn pits used to incinerate garbage and other refuse including food, paper, plastics and rubber and blowing dust and diesel exhaust for 24 hours a day, seven days a week for four consecutive months. Appellant asserted that he developed constant postnasal drip starting during his tour of duty in April 2011 and used over-the-counter medicines. He submitted a travel request dated November 20, 2011.

In a July 31, 2012 report, Dr. James M. Combs, a Board-certified physiatrist, saw appellant for a postdeployment examination. Appellant reported being deployed to Afghanistan for four months and was exposed to smoke from burning debris and airborne sand. He indicated that he developed respiratory irritation during his deployment which has persisted. Dr. Combs referred appellant to a laryngologist. Appellant also submitted employing establishment medical notes from William Otto, a nonspecific health care provider, dated January 26, 2009, who treated him for mild congestion, scratchy throat and intermittent dry cough which did not interfere with his ability to work. He noted findings upon physical examination of respiration rhythm and depth was normal, respiratory movements were normal and he was clear to auscultation. Mr. Otto diagnosed upper respiratory infection and prescribed Sudafed and Robitussen. He noted that the injury or illness was not work related or battle related and released appellant to work without restrictions. In a January 31, 2009 note, Mr. Otto indicated that appellant presented with persistent cold symptoms, including dry cough and congestion, after four days and reported taking medications prescribed without relief. He noted findings upon examination of normal respiratory rhythm and depth, normal respiratory movements and clear auscultation. Mr. Otto diagnosed upper respiratory infection and prescribed additional medications. He noted the injury or illness was not work related or battle related and released appellant to work without restrictions. Appellant was treated on June 8, 2009 by Tracy Hinote, a nonspecific health care provider, for a medication refill.

By initial develop letter dated October 29, 2012, OWCP advised appellant of the type of evidence needed to establish his claim. It particularly requested that he submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific work factors. This letter was sent to appellant's address of record. No further information was received.

In a decision dated April 2, 2013, OWCP denied appellant's claim for compensation on the grounds that the medical evidence did not establish that a medical condition was causally related to the accepted work events.

In an appeal request form dated April 13, 2011, appellant requested reconsideration. No additional information was submitted.

In a May 6, 2013 decision, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim. When an employee claims that he or she sustained an injury in the performance of duty, he or she must submit sufficient evidence to establish that he or 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.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 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.³

ANALYSIS -- ISSUE 1

It is not disputed that appellant worked as an electronics technician, space and naval warfare quality assurance evaluator who was deployed in Afghanistan in 2011 and in 2012 and was exposed to burn pits used to incinerate garbage and other refuse as well as blowing dust and diesel exhaust for four consecutive months. The record also indicates that appellant has been treated for an upper respiratory infection. However, appellant has not submitted sufficient medical evidence to establish that his claimed condition is causally related to specific employment factors or conditions.

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).

³ *Solomon Polen*, 51 ECAB 341 (2000).

Appellant submitted a July 31, 2012 report from Dr. Combs who treated him for respiratory irritation. He reported being deployed to Afghanistan for four months and was exposed to smoke from burning debris and airborne sand and developed respiratory irritation. However, Dr. Combs appears merely to be repeating the history of injury as reported by appellant without providing his own opinion regarding whether appellant's condition was work related. He failed to provide a rationalized opinion regarding the causal relationship between appellant's respiratory irritation and the factors of employment believed to have caused or contributed to such condition.⁴ Therefore, this report is insufficient to meet appellant's burden of proof.

Appellant also submitted employing establishment medical notes from William Otto, a nonspecific health care provider, dated January 26 and 31, 2009, who treated appellant for mild congestion, scratchy throat and intermittent dry cough and diagnosed upper respiratory infection. Mr. Otto noted the injury or illness was not work related or battle related. Similarly, on June 8, 2009 appellant was treated by Ms. Hinote, a nonspecific health care provider, for a medication refill. However, the Board notes that there is no evidence that these documents are from a physician. Medical documents not signed by a physician are not probative medical evidence and do not establish appellant's claim.⁵ Therefore, these reports are insufficient to meet appellant's burden of proof.

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 his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship. Causal relationship must be established by rationalized medical opinion evidence.⁶ Appellant failed to submit such evidence and OWCP therefore properly denied his claim for compensation.

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,⁷ 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

⁴ *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

⁵ See 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

⁶ See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

⁷ 5 U.S.C. § 8128(a).

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].”⁸

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.⁹

ANALYSIS -- ISSUE 2

OWCP’s most recent merit decision dated April 2, 2013 denied appellant’s claim for compensation on the grounds that he failed to provide sufficient medical evidence to establish that the diagnosed condition was causally related to established work duties. It denied his reconsideration request, without a merit review and he 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 his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He 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.

The Board notes that the underlying issue in this case is whether appellant’s diagnosed condition is causally related to appellant’s work duties. That is a medical issue which must be addressed by relevant medical evidence.¹⁰ A claimant may be also entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in support of his claim.

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 constitute relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

⁸ 20 C.F.R. § 10.606(b)(2).

⁹ *Id.* at § 10.608(b).

¹⁰ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that his claimed conditions were causally related to his employment. The Board further finds that OWCP properly denied his request for reconsideration dated April 13, 2013.

ORDER

IT IS HEREBY ORDERED THAT the May 6 and April 2, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 28, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board