United States Department of Labor
Employees' Compensation Appeals Board

S.H., Appellant	)	
and	)	**Docket No. 14-1814**
	)	**Issued: March 12, 2015**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Cleveland, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 18, 2014 appellant, through counsel, filed a timely appeal from a June 26, 2014 merit decision of the Office of Workers' Compensation Programs (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 the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish an injury in the performance of duty on March 4, 2013, as alleged.

On appeal counsel contends that OWCP's decision was contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 31, 2013 appellant, then a 54-year-old nursing assistant, filed an occupational disease claim (Form CA-2) alleging that she sustained anaphylaxis causing asthma attack due to exposure to bleach used by an Emergency Medical Services (EMS) worker on March 4, 2013 while she was performing her job duties.

In a June 3, 2013 letter, OWCP notified appellant of the deficiencies of her claim and afforded her 30 days to submit additional evidence and respond to its inquiries.

On March 13, 2013 Dr. Iftekhar Husain, a Board-certified pulmonologist, indicated that he performed a bronchoscopy for recurrent asthma attacks. In a June 17, 2013 report, he indicated that appellant was "exposed to bleach at work repeatedly" and suffered flare-ups of her asthma and anaphylaxis.

In an April 12, 2013 report, Dr. Lawrence Martin, a Board-certified pulmonologist, indicated that appellant had a history of occupationally-exacerbated asthma from her work on the hospice ward at the employing establishment. He reported that her asthma condition predated her work at the employing establishment by approximately one year, but had frequent flare-ups since working on the hospice ward. Dr. Martin noted that appellant had to be hospitalized twice because of severe asthma attacks that occurred while working. He indicated that she believed that these attacks were "triggered by fumes and vapors generated from cleaning agents used on the ward." Dr. Martin recommended that appellant work in an environment that was free of smoke, fumes, and vapors that might trigger her asthma.

On May 5, 2013 Dr. Rana Hejal, a Board-certified pulmonologist, reported that appellant worked on the hospice floor and was admitted to the hospital on May 4, 2013 "after walking into a room that was recently cleaned with bleach." She reported that appellant had asthma, recurrent episodes of anaphylaxis, and severe allergic or anaphylactic reactions to multiple chemicals, including bleach, perfume, cologne, air fresheners, and cats.

On June 19, 2013 the employing establishment controverted appellant. It claimed to have taken precautions to minimize her exposure to irritating odors and chemicals. OWCP submitted a series of e-mail messages, including a message dated June 5, 2013 from Maudie Murray, a nurse manager on the hospice ward, who stated that on May 4, 2013 appellant "was specifically told to not go down towards room 104 because it was being terminally cleaned on the weekend by another EMS worker" and appellant subsequently "went down that hall towards that room to get linen" despite the fact that there was linen on the other end of the hall.

By decision dated July 9, 2013, OWCP denied the claim on the factual basis, finding that appellant had failed to establish exposure to bleach on March 4, 2013, as alleged.

On July 24, 2013 appellant, through counsel, requested a review of the written record by an OWCP hearing representative and submitted a July 29, 2013 narrative statement indicating that she was admitted to the hospital on March 4, 2013.

In a narrative statement dated July 2, 2013, appellant indicated that she was first hospitalized on March 4, 2013 after she had an anaphylactic reaction to bleach at 1:30 p.m. and

was rushed to the emergency department. She further indicated that on May 4, 2013 she had another acute episode of anaphylaxis at 11:00 a.m. and was rushed to the emergency department.

On January 14, 2013 Dr. Elizabeth Mease, a Board-certified occupational medicine specialist, indicated that appellant suffered from recurrent asthma precipitated by exposure to fume and vapors. She recommended that appellant work in an environment reasonably free of exposure to fumes and vapors.

In a March 5, 2013 report, Dr. Frank J. Jacono, a Board-certified pulmonologist, indicated that appellant was admitted to the hospital on March 4, 2013 and diagnosed with asthma exacerbation. He reported that she presented with complaints of acute shortness of breath and wheezing similar to previous asthma attacks "after smelling bleach on her floor 10 minutes before presentation to the emergency department."

On May 13, 2013 Dr. Martin indicated that appellant had another flare-up of environmental asthma and was again hospitalized May 4 and 5, 2013. He reported that her chest x-ray was negative and she was able to go home after an overnight stay.

By decision dated November 26, 2013, an OWCP hearing representative conducted a review of the written record and affirmed the July 9, 2013 decision.

On March 28, 2014 appellant, through counsel, requested reconsideration and submitted a May 4, 2013 report from Dr. Robert Cameron, a Board-certified gastroenterologist, who reported that she underwent an upper and lower endoscopy on April 30, 2013 for epigastric discomfort, and alternating constipation and urgent stools.

Appellant submitted reports dated March 26, 2013 through January 20, 2014 from Dr. Martin. On August 20, 2013 Dr. Martin reiterated his opinion that she had reactions that caused acute asthma and was incapacitated for work in any area around fumes, perfumes, or dusts.

By decision dated June 26, 2014, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] 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[3] was sustained in the performance of duty, as alleged,

[2] *Id.*

[3] OWCP regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. A fact of injury determination is based on two elements. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[5]

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury while in the performance of duty. However, the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[6] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether he or she has established a *prima facie* claim for compensation. The employee has the burden of establishing the occurrence of an alleged injury at the time, place, and in the manner alleged by a preponderance of the evidence.[7] An employee has not met this burden when there are such inconsistencies in the evidence that cast serious doubt upon the validity of the claim. However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong and persuasive evidence.[8]

ANALYSIS

Although appellant filed a Form CA-2 notice of occupational disease, the Board finds that OWCP properly adjudicated appellant's case as a traumatic injury claim. On her claim form, she indicated that she was exposed to bleach on March 4, 2013. Appellant also submitted narrative statements indicating that she was exposed to bleach at work on March 4, 2013. As the implicated exposure occurred within a single workday or shift,[9] OWCP properly treated the claim as a traumatic injury claim.

[4] *See T.H.*, 59 ECAB 388 (2008). *See also Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *Id. See Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

[6] *See Mary Jo Coppolino*, 43 ECAB 988 (1992).

[7] *See R.T.*, Docket No. 08-408 (issued December 16, 2008).

[8] *See Allen C. Hundley*, 53 ECAB 551 (2002); *Earl David Seal*, 49 ECAB 152 (1997).

[9] *See supra* note 3.

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty on March 4, 2013, as alleged. As noted above, the first element of fact of injury requires that she submit evidence establishing that an incident occurred at the time, place, and in the manner alleged. On her claim form, appellant alleged that she was exposed to bleach used by an EMS worker on March 4, 2013 while she was performing her job duties. However, the Board finds that there is insufficient evidence to corroborate her statement.

Appellant alleged that she was exposed to bleach at work on March 4, 2013. However, she did not identify the "EMS worker," where the bleach was located, or the manner or location in which she was exposed. On June 19, 2013 the employing establishment controverted appellant's claim on the basis that it had taken precautions to minimize her exposure to irritating odors and chemicals. Appellant did not provide any corroborating evidence or witness statements verifying that she was exposed to bleach. The Board finds that appellant has failed to provide sufficient factual evidence to support her exposure to any bleach while working at the employing establishment.[10]

An award of compensation may not be based on surmise, conjecture, or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment, nor her belief that her condition was caused by her employment, is sufficient to establish causal relationship.[11] Since she failed to establish the first component of fact of injury, it is not necessary to discuss whether she submitted medical evidence sufficient to establish that a medical condition existed and whether the condition was causally related to the employment factors alleged.[12]

On appeal, counsel contends that OWCP's decision was contrary to fact and law. Based on the findings and reasons stated above, the Board finds that counsel's arguments are 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.

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 on March 4, 2013, as alleged.

[10] *See C.B.*, Docket No. 14-1698 (issued January 7, 2015) (where the Board found that the employee failed to provide sufficient factual evidence to support his exposure to any asbestos, dust, or other irritant while working at the employing establishment).

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

[12] *See Bonnie A. Contreras*, *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 12, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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