United States Department of Labor
Employees' Compensation Appeals Board

C.O., Appellant	)	
and	)	**Docket No. 16-0918**
	)	**Issued: August 1, 2016**
DEPARTMENT OF THE AIR FORCE, RICKENBACKER AIR NATIONAL GUARD, Columbus, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 1, 2016 appellant filed a timely appeal from a December 17, 2015 merit decision and a February 16, 2016 nonmerit 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.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a loss of smell causally related to the February 2, 2002 employment incident; and (2) whether OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 30, 2015 appellant, then a 62-year-old former aircraft mechanic crew chief, filed a Form CA-1 alleging that on February 5, 2002 he suffered from anosmia as a result of

[1] 5 U.S.C. § 8101 *et seq.*

being sprayed with aircraft deicing fluid at work.[2] He stated that he was standing behind an aircraft before launch while calling flight control. As appellant looked up, he noticed that mist from the deicing fluid had covered his glasses. He related that he was not wearing any safety gear. In a first report of injury, dated October 23, 2015, appellant reiterated his history of injury.

In a February 8, 2002 memorandum, a supervisor indicated that a counseling session was held with appellant on February 7, 2002 regarding the deicing incident. Appellant informed the supervisor that he had a persisent scent of deicing fluid throughout his nose. He first made contact with the fluid while standing at the tail of an aircraft that was being spot sprayed before launch as he called flight control. Appellant told the supervisor that he had made quite an effort to get rid of the scent. The supervisor was informed by Master Sergeant (MSgt.) Timothy Harding that drawing a blood sample was possible and that further tests would be performed.

In e-mails dated April 4, 2003 and September 8, 2006, MSgt. Harding addressed scheduling medical treatment for appellant's symptoms from the February 2002 incident.

In letters dated March 13, June 8, and July 9, 2015, Dr. Ashish R. Shah, a Board-certified otolaryngologist, noted that appellant had a long history of loss of smell, seven to eight years ago, after being sprayed in the nose with icing fluid. Appellant had frequent headaches in the mid-facial region. He reported sinus issues, but doubted that he had allergies. Appellant denied nasal obstruction. He had diminished smell and an off-balance issue. Dr. Shah performed an ear, nose, and throat examination which was essentially normal, with the exception of hypertrophic inferior turbinates. A nasal endoscopy after decongestion showed right nasal septal deviation. There was persistent inferior turbinate hypertrophy. Middle meati and sphenocethmoid recesses were clear. Superior nasal cavity and cribriform region appeared clear of any lesions. Dr. Shah reviewed a brain magnetic resonance imaging (MRI) scan report. He provided an impression of hyposmia, headaches and mid-facial pressure, nasal septal deviation, inferior turbinate hypertrophy, recent rhinosinusitis, possible chronic sinusitis, anosmia, disequilibrium, and presyncope. In the July 9, 2015 letter, Dr. Shah opined that appellant's complete smell loss was likely a toxic olfactory cleft injury from the deicing fluid to which he was exposed years ago. He reported that he could not explain appellant's dizziness, but it appeared to be mild. In a preliminary report dated July 13, 2015, Dr. Shah described his excision of the left posterior buccal lesion with closure and bilateral cerumen removal.

In a June 23, 2015 brain MRI scan report, Dr. Melissa B. Davis, a Board-certified radiologist, provided an impression that no brain parenchymal abnormality was detected. There was also no evidence of vestibular schwannoma or labyrinthitis.

In a November 17, 2015 letter, OWCP informed appellant of the deficiencies in his claim and afforded him 30 days to submit additional factual and medical evidence. It also requested that the employing establishment submit medical evidence, if appellant had been treated at its medical facility.

[2] On December 16, 2015 appellant advised OWCP that the time of his injury he was also a member of the National Guard with dual status. He explained that he had to be a member of the National Guard to work as a technician. Appellant related that he had retired from the military in 2009.

In a November 30, 2015 statement, appellant related that a few days after the February 2, 2002 incident, he asked his supervisor whether he smelled deicing fluid. The supervisor responded in the negative. Appellant described his medical treatment and difficulty he had getting assistance from the employing establishment regarding the filing of his occupational disease claim (Form CA-2) for the February 2, 2002 incident.[3] Appellant stated that he only lost his sense of smell. He did not have any preexisting conditions. Appellant was not aware of any exposure to irritants outside his federal employment and had never smoked.

A February 20, 2002 medical form report with, an unknown signature, listed appellant's complaints, provided a history that he was exposed to deicing fluid in his nostrils six weeks ago, diagnosed chemical exposure, and advised that he could return to regular-duty work.

In a February 15, 2002 form incident report, MSgt. Harding noted appellant's symptoms of unusual smell and taste during periodic times of the day after his February 2, 2002 exposure. He provided a history of injury that appellant was exposed to aircraft deicing fluid approximately six weeks ago. Contact was made with his exposed face, (eyes were closed by glasses) and brief inhalation. No rash or skin lesions had developed. However, there was a disturbing and persistent lingering scent in appellant's nostrils and acid taste in his mouth. MSgt. Harding related that he was wearing protective gloves and splash goggles at the time of injury. He noted that an investigation of the February 2, 2002 incident revealed that appellant's short exposure was minor. MSgt. Harding concluded that a physical examination and laboratory test results showed no sign of overexposure.

In a December 17, 2015 decision, OWCP accepted that the claim was timely filed and that the February 2, 2002 incident occurred as alleged. However, it denied appellant's claim as he had failed to submit a rationalized medical opinion to establish that any diagnosed medical condition was causally related to the accepted employment incident.

In a January 22, 2016 appeal request form, received by OWCP on January 28, 2016, appellant checked a box indicating his request for reconsideration. He did not submit additional evidence or argument.

In a February 16, 2016 decision, OWCP denied further merit review of appellant's claim.

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 by the weight of the reliable, probative, and substantial evidence[4] including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.[5]

[3] In addition to filing a Form CA-1, appellant had previously filed an occupational disease claim (Form CA-2) dated February 9, 2002 regarding the February 2, 2002 incident.

[4] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[5] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.[6] There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place, and in the manner alleged.[7]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[8] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[9] The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.[10]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a traumatic injury caused by the accepted February 2, 2002 employment incident. Appellant failed to submit sufficient medical evidence to establish that his loss of smell was causally related to the accepted employment incident.

Dr. Shah's July 9, 2015 report listed essentially normal findings on examination with the exception of hypertrophic inferior turbinates and provided an impression of anosmia, disequilibrium, and presyncope. He opined that appellant's complete smell loss was "likely" a toxic olfactory cleft injury from the deicing fluid that to which he was exposed years ago, but his opinion was equivocal and speculative in nature. His use of the term likely renders his opinion speculative in nature.[11] Further, Dr. Shah did not provide a firm medical diagnosis for appellant's dizziness or provide rationale as to how the condition was related to his exposure to deicing fluid on February 2, 2002.[12] His remaining reports provided a history of the February 2, 2002 work incident and examination findings, but did not offer an opinion relating appellant's diagnosed headaches and nasal conditions for which he underwent surgery to the accepted incident. Medical evidence that does not offer any opinion regarding the cause of an employee's

[6] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

[7] *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

[8] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined, respectively).

[9] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[10] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

[11] *L.R. (E.R.)*, 58 ECAB 369 (2007); *D.D.*, 57 ECAB 734 (2006); *M.W.*, 57 ECAB 710 (2006); *Ceclia M. Corley*, 56 ECAB 662 (2005).

[12] *George A. Davis*, Docket No. 95-1684 (issued April 3, 1997).

condition is of limited probative value.[13] For the reasons stated, the Board finds that Dr. Shah's reports are of diminished probative value and are insufficient to establish appellant's claim.

Similarly, Dr. Davis' June 23, 2015 diagnostic test results are of diminished probative value. Her brain MRI scan report found no brain parenchyinal abnormality or evidence of vestibular schwannoma or labyrinthitis. Dr. Davis did not opine that appellant had a medical condition causally related to the accepted February 2, 2002 work incident.[14]

The February 20, 2002 medical form report, which was not legibly signed, has no probative medical value, as it cannot be established that the author is a physician.[15]

Appellant has not submitted medical evidence from a physician explaining how the February 2, 2002 work incident caused or contributed to his loss of smell. Therefore, the Board finds that there is insufficient medical evidence to establish that appellant sustained a loss of smell causally related to the accepted February 2, 2002 employment incident.

On appeal, appellant contends that the employing establishment falsely stated that he was wearing protective gear at the time of injury. He also asserts that it covered up his injury by changing the vendor of the deicing fluid and type of deicing fluid. Appellant further asserts that the employing establishment retaliated against him for reporting unfair treatment of minorities to higher management when it delayed assistance with the filing of his Form CA-1 and provision of medical treatment. He stated that he has contact information for witnesses who support his statements. However, the relevant issue is whether appellant sustained a loss of smell causally related to the accepted February 2, 2002 employment incident. His assertions regarding false statements, a cover-up, and retaliation by the employing establishment are not relevant to the medical issue of whether he submitted sufficient medical evidence to establish causal relationship.

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

To require OWCP to reopen a case for merit review under section 8128 of FECA,[16] OWCP's regulations provide that 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 OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[17] To be entitled to a merit review of an OWCP decision denying or

[13] *See K.W.*, 59 ECAB 271 (2007); *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

[14] *Id.*

[15] *See D.D.*, *supra* note 11; *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[16] *Supra* note 1. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

[17] 20 C.F.R. § 10.606(b)(3).

terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[18] Section 10.608(b) of the implementing regulations states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.[19]

ANALYSIS -- ISSUE 2

Appellant disagreed with OWCP's denial of his traumatic injury claim and requested reconsideration.

In a January 22, 2016 appeal request form, received on January 28, 2016, appellant requested reconsideration. He did not submit evidence or argument. OWCP denied reconsideration by decision dated February 16, 2016, without reviewing the merits of his claim.

The only evidence appellant submitted on reconsideration was the January 22, 2016 appeal request form. He did not submit any additional evidence or argument. Therefore, appellant provided nothing of relevance for OWCP to consider. The appeal form, on its own, does not comprise a basis for reviewing the merits of the case.[20]

A claimant may be entitled to a merit review by showing that OWCP erroneously applied or interpreted a specific point of law, advancing a relevant legal argument not previously considered by OWCP, or submitting relevant and pertinent new evidence. Appellant did not make any new submission in this case.

The Board accordingly finds that appellant failed to meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a loss of smell causally related to the February 2, 2002 employment incident. The Board further finds that OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

[18] *Id.* at § 10.607(a).

[19] *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[20] *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

ORDER

IT IS HEREBY ORDERED THAT the February 16, 2016 and December 17, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 1, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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