

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

R.L., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS & BORDER PROTECTION,
Blythe, CA, Employer**

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**Docket No. 15-1328
Issued: September 21, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 27, 2015 appellant filed a timely appeal from the December 10, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.²

ISSUE

The issue is whether appellant's exposure to a known active case of tuberculosis (TB) caused an injury.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the issuance of the December 10, 2014 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501(2)(c)(1).

FACTUAL HISTORY

On October 23, 2014 appellant, a 34-year-old border patrol agent filed a traumatic injury claim (Form CA-1) alleging that he was exposed to a known active case of TB on January 23, 2014. He stated that he had a positive TB test in October 2014. Appellant added that a TB skin test in 2009 was negative.

In a November 6, 2014 note, appellant's supervisor confirmed that appellant was in the station processing room at the same time as, and in close proximity to, an apprehended subject during the period January 23 and 25, 2014 while the subject was in the station processing room and holding cells. The subject was later determined to have had an active case of TB at the time of appellant's exposure.

A TB screening record on October 30, 2014 indicated that appellant had a TB skin test with nine millimeters of induration on October 20, 2014 and 11 millimeters of induration on October 28, 2014. Appellant was interviewed for symptoms of TB, but was found to be currently asymptomatic.

In a November 6, 2014 development letter, OWCP advised that exposure alone was insufficient to establish a work-related medical condition. It asked appellant to complete a questionnaire, asking specifically for a physician's opinion supported by medical explanation as to whether his exposure resulted in the specific infection diagnosed, including a description of symptoms, the clinical course of treatment, and a description of his medical history. The questionnaire also asked appellant to list the existence of any nonemployment risk factors. By letter of even date, appellant informed OWCP that he had been in direct contact with the apprehended subject in the processing room, taking his fingerprints and questioning him for several hours to complete the required paperwork. He added that he was previously tested for TB at the academy in 2009 and his results were negative.

Dr. Dat D. Nguyen, a Board-certified pulmonologist and county TB control officer, evaluated appellant to rule out active TB after his exposure to an index case in January 2014. He advised on October 20, 2014 that all testing was negative for active disease. It was determined, however, that appellant had a latent TB infection and was not contagious. Dr. Nguyen indicated that appellant may return to work on October 31, 2014 and that he would be followed throughout the recommended nine-month course of treatment for latent TB.

In a decision dated December 10, 2014, OWCP denied appellant's traumatic injury claim. It accepted that the exposure occurred as alleged, but denied the claim as the medical evidence was insufficient to establish a causally related diagnosis. In particular, OWCP noted that Dr. Nguyen did not offer a rationalized opinion, with objective findings, to explain how the latent TB was diagnosed. As all of the medical records indicated that appellant presented asymptotically, it was not clear whether Dr. Nguyen used the tuberculin skin test, interferon gamma release assays, or some other test to confirm an infection. Appellant did not address whether he had previously received a vaccination for TB or whether he ever had the same or similar infection. OWCP explained that Dr. Nguyen needed to discuss these matters in order to explain a diagnosis and offer a reasoned opinion on its relationship to appellant's employment.

On appeal appellant argues that he is currently taking TB medication prescribed by the county health department and he strongly feels this should be provided by the employing establishment.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ 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. An employee must also establish that such event, incident, or exposure caused an injury.⁴

Simple exposure to a workplace hazard, such as an infectious agent, does not constitute a work-related injury entitling an employee to medical treatment under FECA. The employing establishment therefore should not issue a Form CA-16 to authorize medical testing for an employee who has merely been exposed to a workplace hazard, unless the employee has sustained an identifiable injury or medical condition as a result of that exposure.⁵

An employing establishment may be required, under other statutes or regulations, to provide their employees with medical testing and/or other services in the situations described above.⁶

FECA does not authorize payment for preventive measures such as vaccines and inoculations, and in general, preventive treatment may be a responsibility of the employing establishment under the provisions of 5 U.S.C. § 7901. However, OWCP can authorize treatment for the following conditions, even though such treatment is designed, in part, to prevent further injury: (c) Conversion of tuberculin reaction from negative to positive following exposure to TB in the performance of duty. In this situation, the appropriate therapy may be authorized.⁷

As the Board noted in the case of *Samuel Keim*, Docket No. 04-357 (issued August 3, 2004), OWCP has established special procedures for adjudicating cases of pulmonary TB. FECA Bulletin No. 95-20 (issued June 21, 1995) reiterated and expanded these procedures:

“Background: While the incidence of TB in the general population had been on the decline for several decades, it began to rise again at the end of the 1980’s and

³ 5 U.S.C. § 8102(a).

⁴ *John J. Carlone*, 41 ECAB 354 (1989).

⁵ 20 C.F.R. § 10.303(a).

⁶ *Id.* at § 10.303(b).

⁷ *Id.* at § 10.313.

continues to increase at the present time. Certain strains now prevalent are resistant to some or all of the drug treatments available.

“These developments have heightened concern among agencies whose employees routinely come into contact with members of groups who have a statistically high risk of having TB. The CDC has identified certain kinds of workplaces to be high risk settings for TB infection. These settings include health care facilities, correctional institutions and drug treatment centers, among others. Employees, who may, therefore, have increased risk of exposure include doctors and nurses in hospitals administered by the Department of Veterans Affairs, agents of the U.S. Marshals Service and workers in the Federal prison system.

“While the Act has long had procedures for addressing cases involving infectious diseases, including TB, it has recently come to our attention that they have not been uniformly followed in all district offices. This problem, along with the need to ensure that we consider the various circumstances under which exposure may occur, have led us to reiterate and expand our procedures in this area.

“Action:

1. The development letter to claimants for pulmonary diseases other than asbestosis (Exhibit 16 of PM Chapter 2.806) asks for a detailed description of the work-related exposure. This question continues to be valid, but where TB is claimed, it is not necessary to obtain the names of specific persons to whom the employee was exposed. Repeated exposure to populations such as prisoners, hospital patients and IV drug users is sufficient to establish work-related exposure.
2. Claims Examiners must continue to inquire about nonwork exposure. However, if the claimant and the treating physician deny nonwork-related exposure and work-related exposure has been established, the case should be accepted if evidence of TB infection is present.
3. If both nonwork-related and work-related exposure are involved, the amount and duration of exposure, as well as the length of time between alleged exposure and emergence of signs or symptoms, must be considered in determining whether the condition is work related (see PM Chapter 2.805.4b(2) for a discussion of this point).
4. Evidence of TB infection includes a positive TB skin test. Other medical evidence required, as noted in MEDGUIDE Chapter 4.6, includes a chest x-ray, sputum tests and copies of preemployment physical examinations.
5. Prophylactic treatment (INH therapy) may be authorized based on a positive skin test, even if the x-ray and/or sputum tests are negative. (If these latter two tests are positive, other forms of therapy will likely be employed as well.)”

ANALYSIS

Appellant's workplace exposure is established at a specific point in time, with a specific known infected subject that he processed and was in the proximity for several days. OWCP accepted that he was exposed to a known case of active TB in the performance of duty on January 23, 2014. Appellant has therefore met his burden to establish that he experienced a specific event, incident, or exposure occurring at the time, place, and in the manner alleged. The question that remains is whether this workplace exposure caused an injury.

The October 30, 2014 report of Dr. Nguyen, the pulmonologist, was the only medical report submitted to support appellant's injury claim. He advised that all testing was negative for active disease, but he found that appellant had a latent TB infection, however, he was not contagious. He did not explain a basis for his finding. A TB screening record on October 30, 2014 without explanation indicated that appellant had a TB skin test on two separate occasions, with nine millimeters of induration on October 20, 2014 and 11 millimeters of induration on October 28, 2014. Dr. Nguyen did not report whether this was a positive skin test or represented a conversion of tuberculin reaction from negative to positive following exposure to TB in the performance of duty. In addition, neither appellant nor Dr. Nguyen denied any nonwork-related exposure.

Given appellant's accepted workplace exposure and Dr. Nguyen's diagnosis of latent TB infection, the Board will set aside the denial of appellant's claim and remand the case for further development. Pursuant to the procedural manual, OWCP shall inquire about any nonwork-related exposure to TB. Further, it shall inquire with Dr. Nguyen as to whether TB infection is present (latent or otherwise) as evidenced by a positive TB skin test he reported on October 20, 2014. After such further development as may be appropriate, OWCP shall issue a *de novo* decision on appellant's injury claim.

CONCLUSION

The Board finds that this case is not in posture for decision. Further development is warranted.

ORDER

IT IS HEREBY ORDERED THAT the December 10, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: September 21, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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