

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

S.C., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TEXAS SERVICE CENTER, Dallas, TX,
Employer**

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**Docket No. 16-1572
Issued: January 24, 2017**

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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 29, 2016 appellant filed a timely appeal from a February 3, 2016 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 over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish kidney failure causally related to exposure to mold at the employing establishment.

On appeal appellant asserts that his constitutional rights to due process and fundamental fairness were violated by OWCP in its consideration of his claim. He maintains that OWCP decisions were based on evidence not provided to him, that he was held to a heightened

¹ 5 U.S.C. § 8101 *et seq.*

evidentiary standard, and that OWCP made incorrect assumptions. Appellant concludes that the medical evidence of record establishes his claim.

FACTUAL HISTORY

On May 15, 2015 appellant, then a 43-year-old attorney, filed an occupational disease claim (Form CA-2) alleging that exposure to mold at the 7701 North Stemmons Freeway, Dallas, Texas (hereinafter 7701 Stemmons) employing establishment facility caused acute kidney failure. He noted that he was admitted to Baylor University Hospital in August 2014 and maintained that the medical evidence ruled out other possible causes for his condition. The employing establishment commented that appellant no longer worked at 7701 Stemmons as he had been transferred to another location. It indicated that appellant's work assignment had not changed.²

In a separate statement, appellant reported that he was not feeling well on August 13, 2014 and went to see his personal physician, Dr. Shari Gamarnik, a Board-certified family physician, who performed tests. Dr. Gamarnik called him the next day with test results and informed him to immediately report to the emergency room at Baylor Hospital for admission, where he was treated by Dr. Christopher Hebert, Board-certified in internal medicine and nephrology. Appellant continued that, although improved, he had permanently lost at least half of his healthy kidney function and that testing ordered by Dr. Hebert had ruled out all causes with the exception of exposure to mold. He noted that, following his illness, the employing establishment had conducted an investigation and concluded that the 7701 Stemmons facility had an unacceptable amount of toxic mold.

An undated "supervisor's narrative," completed by appellant's unidentified first-line supervisor, noted that he (the supervisor) worked at the Vermont Service Center, where appellant had worked until May 2014 when he transferred to the Texas Service Center. The supervisor related that appellant worked at the 7701 Stemmons facility until hospitalization on August 14, 2014 and teleworked until another workstation was secured. The supervisor noted that asbestos and mold were identified at the 7701 Stemmons facility in June 2014, and mold testing to identify remediation needs had occurred.

By letter dated June 3, 2015, OWCP informed appellant of the evidence needed to establish his claim. It indicated that it had received his personal statement and a statement from the employing establishment.

Evidence submitted includes a September 25, 2014 mold report indicating that mold spores were found in appellant's 7701 Stemmons office. An occupational safety and health report dated December 13, 2014 noted that an inspection was performed at 7701 Stemmons from

² The Board notes that appellant had an additional claim before the Board, adjudicated by OWCP under File No. xxxxxx135. In that case, appellant claimed employment-related disability caused by an accepted coccyx contusion and parasitic infestation acquired during Peace Corps service in 1997. In an October 2, 2000 decision, the Board remanded appellant's case to OWCP to determine the period appellant was disabled due to the accepted conditions. Docket No. 99-1531 (issued October 2, 2000). The instant case was adjudicated under File No. xxxxxx057.

December 9 to 11, 2014.³ The report indicated that testing for mold was positive and, as a result of suspected exposure to mold, an unidentified employee had sustained a debilitating illness and had been permanently removed from 7701 Stemmons. The report concluded that a mold and asbestosis remediation project was ongoing, but acknowledged that significant work remained to be done to bring the building to an acceptable condition. A leave analysis documented appellant's leave from pay period 5 in 2014 to pay period 9 in 2015.

In a July 1, 2015 declaration, appellant indicated that he transferred from Vermont to Texas in May 2014 where he worked at 7701 Stemmons until August 2014. He related that many tests and exploratory procedures were conducted while he was hospitalized, all of which ruled out a cause of his kidney failure, but that exposure to mold had not been ruled out and was the only remaining possible cause. Appellant indicated that he continued to be treated by Dr. Hebert. He maintained that his only exposure to mold was at 7701 Stemmons.

The record includes numerous reports of appellant's hospitalization at Baylor University Medical Center where he was admitted through the emergency department on August 14, 2014 and was diagnosed with acute renal failure and hypertension. On the day of admission, appellant was seen by Dr. Hebert. Dr. Hebert noted the onset of an acute kidney injury. He reported that the etiology was puzzling, not nephrotic, with only minimal blood in urine and no casts reported, and that the renal ultrasound was unremarkable. Dr. Hebert advised that progressive glomerular nephritis could not be ruled out, but that testing for anti-neutrophil cytoplasmic and antinuclear antibodies was negative. He advised that appellant possibly had tubulointerstitial nephritis and uveitis syndrome, but noted that appellant did not complain of any eye pain or change in visual acuity, and this condition was very rare and more commonly associated with the pediatric population. Dr. Hebert ordered a renal biopsy and steroid medication. An ultrasound-guided renal biopsy was performed on August 15, 2014. Dr. Daniel Savino, Board-certified in anatomic and clinical pathology, advised that the biopsy was abnormal due to the presence of multiple nonnecrotic granulomas. He reported that stains for acid-fast bacilli and fungi were done in pathology and found to be negative.

Appellant was followed daily by Dr. Joseph N. Khalil, an internist, while hospitalized. Dr. Khalil noted that testing for mosquito and tick borne illness was negative. Appellant was discharged on August 18, 2014. At discharge, Dr. Khalil noted that a Quantiferon gold test was sent with added fungal stain, which was pending. Appellant was to follow-up with Dr. Hebert. Discharge diagnoses were acute kidney injury, fatigue, acute conjunctivitis, and malaise. Appellant also submitted laboratory results dated March 6, 2015 consisting of a complete blood count and comprehensive metabolic panel.

Dr. Hebert provided outpatient treatment notes dated August 26, 2014 to April 14, 2015. In each report he recorded vital signs, provided a review of systems, and diagnosed granulomatous interstitial nephritis and nephropathy, not specified as acute or chronic, with other specified pathological lesion in kidney. Dr. Hebert also provided results of laboratory tests including renal function panel, urinalysis, and basic metabolic panel. These indicated that

³ The report identified three Dallas area facilities used for employing establishment operations: 7701 N. Stemmons Freeway, 8001 N. Stemmons Freeway, and 4141 N. Saint Augustine Drive in Mesquite, Texas.

appellant's estimated glomerular filtration rate (EGFR) was low. A publication explaining EGFR was included.

In correspondence dated April 17, 2015, Dr. Hebert noted that appellant had been his patient since August 2014 with acute kidney injury and that kidney biopsy done while appellant was hospitalized revealed granulomatous interstitial nephritis. He advised that this type of kidney disease was a rare histologic diagnosis, present in less than one percent of native renal biopsies, and had been associated with certain medications, autoimmune diseases, crystalline deposits, certain malignancies, and several types of infection. Dr. Hebert related that in appellant's case, following thorough blood testing and extensive work-up, medications, autoimmune diseases, crystalline deposits, and certain malignancies were ruled out. He continued that the most common infectious causes were typically related to mycobacteria and fungi, noting that appellant's early blood tests essentially ruled out mycobacterial infection, leaving the one possibility of a fungal infection or exposure as the one etiology that was very difficult to completely eliminate. Dr. Hebert concluded:

“Although we have not determined that an occupational exposure has directly resulted in the development of this disease process, it is hard to completely attribute this to coincidence given how rare of a disease state it already is. For that reason, I have advised him to avoid buildings or known occupational exposures to various types of fungi. My hope is that you will cooperate with him, and assist us with this recommendation.”

By decision dated August 27, 2015, OWCP denied appellant's claim. It found that appellant established the claimed exposure to mold, but the medical evidence submitted was insufficient to establish that his diagnosed kidney condition was causally related to the employment exposure.

Appellant timely requested a hearing, that was held on December 10, 2015. At the hearing he indicated that he had not received all mold testing documentation. Appellant asserted that since every other cause of his kidney condition had been ruled out, it must be due to mold. The hearing representative advised him of the exact medical evidence needed to establish causal relationship between mold exposure and the diagnosed condition. She also noted that Dr. Khalil indicated that a Quantiferon gold laboratory test was pending and asked that appellant submit the results. The record was held open for 30 days.

In correspondence dated January 11, 2016 addressed to an OWCP hearing representative, appellant maintained that Dr. Hebert's opinion was not speculative and was sufficient to establish that his kidney failure was caused by occupational exposure to mold.

By decision dated February 3, 2016, OWCP's hearing representative affirmed the August 27, 2015 decision. She agreed that the record established that appellant was exposed to mold at the employing establishment, but found that the medical evidence of record did not establish that his kidney condition was caused by the occupational exposure. The hearing representative found that Dr. Hebert did not comment on the degree of appellant's exposure and also found his opinion to be speculative.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish 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, and that the claim was timely filed within the applicable time limitation period of FECA.⁴ When an employee claims that he or she sustained an injury in the performance of duty,⁵ 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.⁶ The employee must also establish that such event, incident, or exposure caused an injury.⁷ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁸

OWCP regulations define the term “occupational disease or illness” as a condition produced by the work environment over a period longer than a single workday or shift.”⁹ 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 diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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.¹⁰

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹¹ 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 employee.¹² Neither the mere fact that a disease or condition manifests itself during a period

⁴ 5 U.S.C. § 8101(1); *L.M.*, Docket No. 16-0143 (issued February 19, 2016); *B.B.*, 59 ECAB 234 (2007).

⁵ *Id.* at § 8102(a).

⁶ *J.C.*, Docket No. 16-0057 (issued February 10, 2016); *E.A.*, 58 ECAB 677 (2007).

⁷ *Id.*

⁸ *R.H.*, 59 ECAB 382 (2008).

⁹ 20 C.F.R. § 10.5(ee).

¹⁰ *Roy L. Humphrey*, 57 ECAB 238 (2005).

¹¹ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹² *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹³

ANALYSIS

OWCP accepted that appellant was exposed to mold when he worked at 7701 Stemmons. However, the Board finds that the medical evidence submitted is insufficient to establish the claim. The medical evidence submitted to support a claim for compensation should reflect a correct history, and the physician should offer a medically sound explanation of how the claimed work event caused or aggravated the claimed condition.¹⁴ No physician did so in this case.

In an April 17, 2015 report, Dr. Hebert noted treating appellant since August 2014 for acute kidney injury and that kidney biopsy done while appellant was hospitalized revealed granulomatous interstitial nephritis. He advised that this type of kidney disease was a rare histologic diagnosis, present in less than one percent of renal biopsies and had been associated with certain medications, autoimmune diseases, crystalline deposits, certain malignancies, and several types of infections. Dr. Hebert related that, in appellant's case, thorough blood testing and extensive work-up ruled out medications, autoimmune diseases, crystalline deposits, and certain malignancies as the cause of appellant's kidney condition. He continued that the most common infectious causes were typically related to mycobacteria and fungi, noting that appellant's early blood tests essentially ruled out mycobacterial infection, leaving the one possibility of a fungal infection or exposure as the only etiology that was very difficult to completely eliminate. Dr. Hebert concluded:

“Although we have not determined that an occupational exposure has directly resulted in the development of this disease process, it is hard to completely attribute this to coincidence given how rare of a disease state it already is. For that reason, I have advised him to avoid buildings or known occupational exposures to various types of fungi. My hope is that you will cooperate with him, and assist us with this recommendation.”

The mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.¹⁵ Moreover, opinions which are speculative or equivocal are of diminished probative value.¹⁶ The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to a claimant's federal employment and such relationship must be supported with affirmative evidence, explained by

¹³ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹⁴ *D.D.*, Docket No. 13-1517 (issued April 14, 2014).

¹⁵ *R.L.*, Docket No. 15-0946 (issued October 19, 2015).

¹⁶ *See S.E.*, Docket No. 15-1759 (issued January 8, 2016) (finding that opinions such as the condition is probably related, most likely related, or could be related are speculative and diminish the probative value of the medical opinion); *Cecilia M. Corley*, 56 ECAB 662 (2005) (finding that medical opinions which are speculative or equivocal are of diminished probative value).

medical rationale and be based upon a complete and accurate medical and factual background of the claimant.¹⁷ Dr. Hebert's April 17, 2015 report has no clear supporting opinion on causal relationship.

Also submitted were many laboratory tests, procedure notes, and hospital records. These did not provide a physician's opinion on the cause of any diagnosed conditions. Likewise, Dr. Khalil merely discussed appellant's hospital course. The Board has long held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁸

As to appellant's assertion on appeal that OWCP applied an incorrect evidentiary standard, as noted, the Board has long held that to support causal relationship, 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 employee.¹⁹

It is appellant's burden to establish that the claimed kidney condition is causally related to factors of his federal employment. He submitted insufficient evidence to show causal relationship between the accepted occupational exposure to mold and the claimed condition.

As to appellant's assertion on appeal that his constitutional rights to due process and fundamental fairness were violated, the Supreme Court has held that constitutional questions are unsuited to resolution in administrative hearing procedures.²⁰ As the Board is an administrative body, it does not have jurisdiction to review a constitutional claim such as that made by appellant. Federal courts retain jurisdiction over decisions under FECA where there is a charge of a violation of a clear statutory mandate or where there is a constitutional claim.²¹

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 did not meet his burden of proof to establish that his kidney failure was caused or aggravated by exposure to mold at the 7701 Stemmons facility.

¹⁷ *A.D.*, 58 ECAB 149 (2006).

¹⁸ *G.M.*, Docket No. 14-2057 (issued May 12, 2015); *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *Willie M. Miller*, 53 ECAB 697 (2002).

¹⁹ *Supra* note 12.

²⁰ *See Johnson V. Robinson*, 415 U.S. 361 (1974) and cases cited therein.

²¹ *Robert F. Stone*, 57 ECAB 292 (2005).

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board