United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
	)	**Docket No. 17-0056**
and	)	**Issued: March 21, 2017**
DEPARTMENT OF VETERANS AFFAIRS, OAKHURST OUTPATIENT CLINIC, Oakhurst, CA, Employer	)	

Appearances:
Sara Kincaid, Esq., for the appellant[1]
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 17, 2016 appellant, through counsel, filed a timely appeal from a May 4, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a traumatic injury while in the performance of duty on January 13, 2014, as alleged.

On appeal counsel contends that the evidence of record is sufficient to establish appellant's claim.

FACTUAL HISTORY

On January 21, 2014 appellant, then a 54-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on January 13, 2014 she vomited twice, lacked focus, became confused, and experienced headache and dizziness due to her exposure to toxic fumes from a malfunctioning heating unit at work. She claimed that toxic exhaust fumes were emitted into her office, examination rooms, and nearby areas of a clinic.

Medical reports and diagnostic test results dated January 14 to March 10, 2014 addressed appellant's diagnosis of toxic effect of carbon monoxide and carbon monoxide poisoning and her work capacity.

In a January 30, 2014 letter, the employing establishment requested that OWCP determine whether appellant's request for continuation of pay should be granted in light of a lack of medical evidence to support the request.

By letter dated February 13, 2014, OWCP noted that as appellant's injury initially appeared to be a minor injury resulting in minimal or no lost time from work, and because the employing establishment had not controverted continuation of pay or challenged the merits of the case, payment of a limited amount of medical expenses was administratively approved and the merits of the claim had not been formally considered. The claim was reopened for consideration by OWCP because the employing establishment had challenged the claim.

In a February 14, 2014 letter, Dr. T. Sutton, an employing establishment physician Board-certified in occupational medicine, noted that there was no evidence to support that appellant had carbon monoxide poisoning due to a blockage of an air conditioning unit causing a noxious smell. He researched medical literature and found no cases where carbon monoxide poisoning resulted from a blocked air conditioner. Dr. Sutton related that such an occurrence was illogical because there was no burning of fossil fuels involved. In addition, he noted that eight employees were working in the same environment and none of them had developed this problem. Dr. Sutton maintained that it was conceivable that appellant had transient irritational symptoms from the blocked air conditioner, but that three hours was too limited of an exposure to cause any significant impairment. He further maintained that certainly she had no residuals from this minimal exposure, which had been documented in the medical literature.

A JS West Propane Gas work order dated January 29, 2014 indicated that the gas pressure was tested inside the employing establishment's building. It was determined that the pressure was good and there were no leaks.

In a January 19, 2014 narrative statement, appellant described the alleged January 13, 2014 incident. When she reported to work on that date she noticed a strange and out-of-the ordinary smell when she entered the building. Appellant asked her staff about the smell and was told that someone was coming to check on the situation and they should continue to see patients. She returned to her office and within 20 minutes she experienced watery/burning eyes, burning/tingling lips, hoarseness, coughing, and shortness of breath, a dull headache, dizziness, and nausea. Appellant reported her illness to three staff members who exclaimed that her face was bright red and asked if she was okay. She briefly saw a patient and then returned to her office to retrieve water. Appellant's symptoms worsened and she rushed to a restroom to vomit. When she exited the restroom, three staff members had headaches, nausea, hoarseness, and burning eyes. Appellant went outside to get some air and encouraged staff members to do the same. She assessed another patient and later became light-headed and vomited again. Appellant felt groggy, with poor focus of attention when she left the restroom. She noted that five other staff members were having similar symptoms. Appellant encouraged the staff to grab a bottle of water and get out of the building. The head nurse finally agreed to let the staff go, but she did not call 911 for emergency services to evaluate the fumes or to provide for emergency treatment to those affected by the toxic gas. Appellant and two other staff members had to wait several hours before going home because they could not drive as they were groggy. They had to wait for available family members to drive them home. Appellant noted a worsening of her symptoms from January 14 to 16, 2014 for which she sought medical treatment. She maintained that she had never experienced toxic substance/gas/carbon monoxide exposure.

In a January 20, 2014 narrative statement, an unidentified coworker noted that he had developed carbon monoxide poisoning due to his exposure to exhaust fumes at work on January 13, 2014, one year prior to this date. He also noted that appellant and other coworkers were sickened by the strong exhaust fumes on January 13, 2014.[3]

A January 16, 2013 incident report from the California Department of Forestry and Fire Protection noted that a "HZM2" was dispatched to check a strange smell at the employing establishment. Upon arrival, five employees complained about dizziness and feeling ill. A carbon monoxide detector and 4-gas monitor were used in the building to determine that no gases were present. The employees were evaluated and no medical treatment was necessary. A HAZMAT team was cancelled.

By letter dated June 26, 2014, OWCP notified appellant of the deficiencies of her claim and afforded her 30 days to submit additional medical evidence. It also requested that the employing establishment respond to her allegations and provide information regarding her workplace exposure.

Diagnostic test results and medical reports dated May 7 to 12, 2014 addressed appellant's carbon monoxide poisoning symptoms and conditions.

In a June 30, 2014 response to OWCP's June 26, 2014 development letter, appellant noted that the January 20, 2014 statement was authored by her coworker, M.F. and recorded

[3] The coworker's name was redacted.

points of clarification that she deemed necessary regarding her exposure claim. However, M.F. did not re-sign this new statement regarding the clarification of factual allegations.

By letter dated July 14, 2014, the employing establishment submitted a July 7, 2014 e-mail from E.Q., manager of the employing establishment clinic, who disagreed with appellant's claim that she was exposed to carbon monoxide. E.Q. noted a bad odor upon appellant's arrival to the clinic on January 13, 2014. The smell was similar to one noted one year earlier in the building. A local fire department investigated the smell with a carbon monoxide meter and determined that the building was safe as no carbon monoxide was detected. On January 13, 2014 the odorous heating ventilation and air conditioning (HVAC) unit was shut off and the side and front doors of the clinic were opened to air out the building. Appellant was reassigned to an examination room further from the source of the smell at the beginning of her shift. Employees reporting symptoms were encouraged to get fresh air and go home if needed. Appellant stepped out of the building multiple times due to her sensitivity to the odor. A propane company responded to a service call and confirmed that there were no propane leaks. An HVAC repairman identified a sooty buildup on an air conditioner unit which caused the heating element on a compressor to burn out. Air samples were not obtained. The odor was cleared before noon. Three employees went home sick, eight employees stayed their entire shift, and E.Q. stayed until after 5:00 p.m. E.Q. noted that none of the exposed employees had any residual effects. The clinic had since had a carbon monoxide monitor installed and the memory readings always read zero.

An HVAC service order dated January 13, 2014 from Wilkins Enterprises indicated that an air conditioner was plugged with soot. A heat exchange was replaced and the burner operation was checked.

Medical reports dated July 17 to 23, and November 14, 2014 addressed appellant's alleged carbon monoxide poisoning and work capacity and the causal relationship between her medical condition and the alleged January 13, 2014 employment incident.

On December 3, 2014 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Gerald B. Levine, a Board-certified internist specializing in pulmonary diseases, for a second opinion. In a January 25, 2015 report, Dr. Levine reviewed the medical record and reported normal findings on diagnostic and physical examination, noting "no obvious pulmonary repercussions from her exposure." He noted that appellant's alleged toxic exposure at work had not been objectively elucidated. Dr. Levine further noted that a diagnosis of carbon monoxide poisoning had not been established. He indicated that appellant had no work restrictions.

In a February 17, 2015 decision, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the January 13, 2014 incident occurred at the time and place and in the manner alleged. It noted that the employing establishment submitted evidence to establish that she was not exposed to carbon monoxide or toxic gas and Dr. Levine found no factual or objective confirmation of a diagnosis of carbon monoxide poisoning.

On June 5, 2015 appellant, through counsel, requested reconsideration. She argued that appellant had submitted sufficient evidence to establish that her injuries were directly caused by

her exposure to toxic fumes at work. Counsel noted that inspection reports from JS West Propane Company established that appellant was exposed to toxic fumes from gas leaks and soot problems at the employing establishment. She further noted that her coworkers experienced the same or similar symptoms after the January 13, 2014 exposure. Counsel contended that Dr. Levine's opinion regarding the facts of the case should not be given any weight in determining whether fact of injury had been established.

Counsel submitted medical evidence which addressed appellant's work capacity and alleged carbon monoxide poisoning condition.

In a September 11, 2015 decision, OWCP denied modification of the February 17, 2015 decision. It found that the arguments and medical evidence submitted were insufficient to establish that the January 13, 2014 incident occurred as alleged.

On February 4, 2016 counsel requested reconsideration of the September 11, 2015 decision. She submitted articles from publications which addressed carbon monoxide detectors and carbon monoxide and propane. Counsel also submitted printouts from JS West Propane Co. dated January 11, 2011 and December 22, 2014 and a bill from Johnson Air dated January 13, 2014. She submitted medical reports dated February 2012 to August 7, 2015 which addressed appellant's conditions.

In a May 4, 2016 decision, OWCP denied modification of the September 11, 2015 decision. It found that the evidence of record failed to establish that appellant was exposed to toxic fumes in the performance of duty on January 13, 2014, as alleged.

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; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

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] Second, the employee must submit evidence,

[4] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

[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).

generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[8] The employee may establish that the employment incident occurred as alleged, but fail to show that her disability or condition relates to the employment incident.[9]

An employee's statement 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 or persuasive evidence.[10] Moreover, an injury does not have to be confirmed by eyewitnesses. The employee's statement, however, must be consistent with the surrounding facts and circumstances and her subsequent course of action. An employee has not met his or her burden in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Circumstances such 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, if otherwise unexplained, cast doubt on an employee's statement in determining whether a *prima facie* case has been established.[11]

ANALYSIS

The Board finds that appellant has failed to meet her burden of proof to establish her traumatic injury claim.

Appellant filed her claim on January 21, 2014. She alleged a traumatic injury due to her exposure to toxic fumes at work on January 13, 2014, while in the performance of duty. Appellant's statement that she sustained a traumatic injury on January 13, 2014, although entitled to great weight, is contradicted by the employing establishment's statements and the medical evidence.

The employing establishment noted that while a sooty buildup was found on an air conditioner unit on January 13, 2014, testing of the air in the clinic on that date by a propane company found no propane leaks. It further noted that a carbon monoxide monitor was subsequently installed in the clinic building and the memory readings always read zero.

In a January 25, 2015 report, Dr. Levine, an OWCP referral physician, found that appellant's alleged toxic exposure at work had not been objectively elucidated. He further found that a diagnosis of carbon monoxide poisoning had not been established based on his normal diagnostic and physical examination findings, that there were no "obvious pulmonary repercussions," and that appellant had no work restrictions.

[8] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[9] *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[10] *R.T.*, Docket No. 08-408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 277 (2005).

[11] *Betty J. Smith*, 54 ECAB 174 (2002); *L.D.*, Docket No. 16-0199 (issued March 8, 2016).

The Board finds that appellant failed to provide evidence sufficient to establish that the January 13, 2014 incident occurred at work, as alleged.[12] Appellant has not met her burden of proof to establish any employment-related conditions.[13] As such, it is unnecessary to address the medical evidence regarding causal relationship.[14]

On appeal, counsel contends that the evidence of record is sufficient to establish appellant's claim. As found, appellant did not submit sufficient evidence to establish that the January 13, 2014 incident occurred as alleged. Accordingly, she failed to establish fact of injury in the performance of duty.

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 a traumatic injury in the performance of duty on January 13, 2014, as alleged.

[12] *T.M.*, Docket No. 13-1997 (issued February 11, 2014).

[13] *See S.P.*, 59 ECAB 184 (2007); *Michael A. Danowski*, 34 ECAB 706 (1983).

[14] *Alvin V. Gadd*, 57 ECAB 172 (2005).

ORDER

IT IS HEREBY ORDERED THAT the May 4, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 21, 2017
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board