United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant	)	
and	)	**Docket No. 17-0155**
	)	**Issued: May 12, 2017**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Montgomery, AL, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 31, 2016 appellant filed a timely appeal from a September 2, 2016 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.

FACTUAL HISTORY

On March 14, 2016 appellant, then a 58-year-old medical records technician, filed an occupational disease clam (Form CA-2) alleging that she sustained headaches; high blood

[1] 5 U.S.C. § 8101 *et seq.*

pressure; a sinus condition; red, itchy, and watery eyes; congestion; lightheadedness; nausea; a runny nose; dizziness; aggravation of rheumatoid arthritis; lumbar spine conditions; wheezing; allergies; blurred vision; and sensitivity to light in the course of her employment. She attributed these conditions to working in a particular building. Appellant first became aware of the conditions and of their relationship to her federal employment on December 29, 2015. She stopped work on December 29, 2015 and returned to work on March 1, 2016.

By letter dated March 29, 2016, OWCP advised appellant of the evidence necessary to establish her claim. It noted that she had not submitted any evidence in support of her claim, and afforded her 30 days to submit additional evidence and to respond to its inquiries.

By letter dated April 5, 2016, the employing establishment noted that employees had been complaining of respiratory complications after working in a newly-constructed building. An indoor air quality investigation was undertaken on February 9, 2016. An industrial hygienist collected air samples to compare them to outdoor air and air from surrounding offices and clinical areas. Sampling conducted on this date demonstrated that the airborne particulate counts inside the area alleged to be affected were at least as low as outside air and surrounding areas. The industrial hygienist also examined information regarding air quality from a computerized system capable of monitoring levels of temperature, humidity, and carbon dioxide, which were also within normal ranges. A third party company had previously measured levels of various potentially harmful airborne chemicals and particulate matter, finding that results for all substances were below permissible limits set by the Occupational Safety and Health Administration (OSHA). The employing establishment submitted the results from each of these studies to the case record.

On April 4, 2016 appellant responded to OWCP's inquiries. She noted that merely entering the building would trigger her conditions, and that the quality of the air was causing her health problems. In an attached letter, appellant noted that she had previously experienced exposure to mold at another location, which resulted in similar conditions.

By report dated February 10, 2016, Dr. David Thrasher, Board-certified in internal medicine and pulmonary disease, noted that appellant experienced environmentally-induced asthma from exposure at the employing establishment. He noted that she was working at the newly constructed employing establishment facility and was having problems with her breathing. Appellant had been moved from several sites at work, but the moves did not help. Dr. Thrasher also noted that she did not seem to have problems on weekends when she was not at work. He reported that the results of a pulmonary function test were "very disturbing," and provided his impression of a severe obstructive lung disease. A chest x-ray revealed no infiltrate.

By decision dated May 10, 2016, OWCP denied appellant's claim for compensation. It found that she had not submitted factual evidence to support the allegation that her work environment caused her claimed conditions. OWCP also noted that a series of environmental studies had found no evidence of poor air quality.

On June 7, 2016 appellant requested reconsideration of OWCP's May 10, 2016 decision.

By decision dated September 2, 2016, OWCP reviewed the merits of appellant's claim. It accepted that she had established the factual component of fact of injury, but denied modification the basis that she had not established a causal relationship between the alleged work factors and her diagnosed conditions.

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 or specific condition for which compensation is claimed is causally related to the employment injury.[2] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.[3]

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 employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[4]

With respect to the first component of fact of injury, the employee has the burden of establishing the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence.[5] 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 or persuasive evidence.[6]

ANALYSIS

Whether an injury occurs in the performance of duty is a preliminary issue before the merits of the claim are adjudicated.[7] The Board finds that appellant has not established that an injury occurred in the performance of duty as alleged. The environmental studies of record

[2] *Gary J. Watling*, 52 ECAB 278-79 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[3] *Michael E. Smith*, 50 ECAB 313, 315 (1999).

[4] *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

[5] *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

[6] *D.B.*, 58 ECAB 464, 466-67 (2007); *Robert A. Gregory*, 40 ECAB 478, 483 (1989).

[7] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

provided by the employing establishment, cast serious doubt upon the validity of the claim.[8] As such, appellant has not met her burden of proof.

An employee's statement alleging that an injury occurred at a given time, place, and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[9] Herein, appellant's allegation of exposure to poor air quality has been refuted by strong and persuasive evidence. The environmental study conducted by an industrial hygienist and a third party company found that there were no problems with air quality within her work area. An indoor air quality investigation of the premises was undertaken on February 9, 2016, at which time an industrial hygienist collected air samples to compare them to outdoor air, air from surrounding offices, and clinical areas. Sampling conducted on this date demonstrated that the airborne particulate counts inside the area alleged to be affected were at least as low as outside air and surrounding areas. The industrial hygienist also examined information regarding air quality from a computerized system capable of monitoring levels of temperature, humidity, and carbon dioxide, which were also within normal ranges. A third party had previously measured levels of various potentially harmful airborne chemicals and particulate matter, finding that results for all substances were below permissible limits set by OSHA. The employing establishment submitted the results from each of these studies to the case record.

Because the record contains objective evidence which cast serious doubt on appellant's alleged work factors, the probative value of her own allegation regarding this work factor is diminished. As such, she has not submitted sufficient evidence to establish the factual portion of her claim.[10]

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 established that she sustained an injury in the performance of duty.

[8] *See G.V.*, Docket No. 08-0655 (issued March 17, 2009).

[9] *Id.*

[10] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 2, 2016 is affirmed, as modified.

Issued: May 12, 2017
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