

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

A.M., Appellant)	
)	
and)	Docket No. 17-0741
)	Issued: April 5, 2018
)	
DEPARTMENT OF EDUCATION, FEDERAL STUDENT AID, Washington, DC, Employer)	
)	

Appearances:
Debra Hauser, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 14, 2017 appellant, through counsel, filed a timely appeal from an October 11, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 met her burden of proof to establish the alleged factors of her federal employment.

On appeal counsel contends that appellant sustained an employment-related injury.

FACTUAL HISTORY

On April 17, 2014 appellant, then a 55-year-old information technology (IT) security compliance manager, filed an occupational disease claim (Form CA-2) alleging that she sustained an injury caused or aggravated by her exposure to fragrances at work. She first became aware of her condition on May 16, 2011 and of its relationship to her federal employment on March 26, 2014. Appellant noted that her symptoms had diminished while she was out of the office for four weeks. She did not stop work.

In an accompanying April 10, 2014 employee statement, appellant noted that beginning in November 2010 she developed headaches at work which made it difficult for her to focus on mundane work activities. In May 2011, she notified her acting supervisor and chief of staff for the technology office of her illness which she attributed to fragrances worn by her coworkers and its impact on her ability to think and breathe. Appellant was later moved to a different office which helped with the onset of her symptoms if she did not leave the room. She sought medical treatment from her primary care physician who diagnosed allergic rhinitis. Appellant noted that, by November 2012, she continued to have symptoms over the weekend. Her physician referred her to an ear, nose, and throat (ENT) physician and a neurologist. The ENT physician diagnosed rhinitis and the neurologist prescribed medication. On December 6, 2013 an allergist also prescribed medication.

Appellant worked four 10-hour days, Monday through Thursday from November 2010 to December 2013. On many days she claimed that she worked more than 10 hours a day. In November 2013, appellant's supervisor changed her four-day workweek schedule to a five-day workweek schedule. In December 2013, appellant was required to work Monday through Friday. On January 24, 2014 she experienced pounding in her chest, headache, dizziness, and ringing in her ears at work. Appellant also had difficulty thinking and keeping her focus. She sought medical treatment, teleworked from home, and used leave for her absence from work. When appellant returned to the office on February 24, 2014 her previous symptoms returned. She sought treatment and returned to work on March 24, 2014. Appellant continued to have symptoms upon her return to work and again sought treatment. On March 26, 2016 she worked at home in the morning and arrived at work in the afternoon. By 3:30 p.m. appellant's symptoms returned and she sought treatment from an employing establishment nurse. She described her work duties which included working in an office environment, interacting all day with individuals in person, by e-mail, or telephone, and attending meetings for five to eight hours.

By development letter dated February 4, 2015, OWCP advised appellant of the deficiencies of her claim and afforded her 30 days to submit additional evidence and respond to its inquiries. It also requested that the employing establishment respond to her allegations and provide

information regarding her workplace exposure and medical evidence, if she had been treated at its medical facility.

In an undated letter, Dr. Linda Wilbanks, the employing establishment's chief information security officer, disputed that appellant's date of injury was May 16, 2011, just six months after she began working at the employing establishment on November 8, 2010. She noted that appellant had a private office. Dr. Wilbanks indicated that, while appellant periodically stated that a coworker's fragrance (perfume, cream, shampoo, dry cleaning) bothered her, she did not state that she could not work or use leave due to her reaction to fragrance. She was allowed to periodically call into a meeting when she was bothered by an attendee's fragrance. Dr. Wilbanks related that appellant's performance reviews did not reflect that she had a medical issue that impacted her job performance. No medical documentation was provided in support of an illness claim until April 2014 when appellant requested reasonable accommodation. Dr. Wilbanks asserted that appellant was not subjected to any potentially harmful substances. Appellant teleworked during the four-week period of office renovations. Upon completion of the renovations she claimed that fumes from new carpet and cleaning made her ill, but Dr. Wilbanks noted that attached documents showed that the air quality had improved after the renovations. Dr. Wilbanks also noted that appellant used public transportation to commute to work. Appellant's job duties included attending meetings with coworkers in conference rooms, offices, or through teleconferences. She worked 10 hours a day, four days a week until December 2013 and subsequently transitioned to 8 hours a day, five days a week. During this time appellant teleworked approximately one to two days a week and occasionally more often. Dr. Wilbanks listed the accommodations offered to appellant due to her condition after the office renovations and noted her rejection of this offer. Appellant's April 2014 request for reasonable accommodation was granted and she was allowed to telework as much as possible even though her position did not support full-time telework and several work tasks were not sufficiently accomplished. When Dr. Wilbanks started working at the employing establishment in September 2012, appellant told her that fragrances bothered her and requested that she not use anything with a scent. She did not see any evidence or have any discussions with appellant that fragrances in the office were debilitating or impacting her abilities to work. Appellant did not take extensive sick leave that required medical documentation or claim that she could not work in the building until after the January 2014 office renovations. Her work schedule was changed due to the need to meet a deadline on Fridays. Regarding appellant's contention that she became ill after arriving at work and working for a short period of time in the office, she noted that appellant was exposed to numerous people and their fragrances while taking public transportation to work, travelling by air, and taking cruises. Dr. Wilbanks further maintained that while she claimed to have her allergic condition for 10 years, there was no documentation to indicate that she had informed the employing establishment about her condition before starting work on November 8, 2010, that she required a private work area, or was unable to attend in-person meetings. She concluded that, while appellant indicated that her date of injury was May 16, 2011, no medical documentation was submitted in support of her claim until April 2014.

The employing establishment submitted a position description for an IT security compliance manager, correspondence regarding appellant's reasonable accommodation request, and indoor air and water quality and odor and mold inspection reports. The indoor air and water quality and odor and mold inspection reports dated June 1, 2011 to July 1, 2104 were essentially unremarkable with the exception of elevated carbon dioxide concentrations which indicated

inadequate ventilation, harmless coliform bacteria and trace solvents common to fuel additives in the water, mold spores in dirt on the ceiling, possible leak of air from an air supply duct in the ceiling, and water damage mold.

In a July 8, 2014 letter, Dr. Bonnie McCafferty, an occupational medicine consultant with the U.S. Department of Health and Human Services, Federal Occupational Health (FOH) Service, reviewed medical records related to appellant's request for reasonable accommodation to permanently work on a full-time basis at home due to her fragrance sensitivity. She noted that appellant was disabled under the Americans with Disabilities Act Amendments (ADAA) and Rehabilitation Act and intermittently impaired. Dr. McCafferty also noted that her request for reasonable accommodation was substantiated by medical documentation. She indicated that appellant had severe allergies and asthma. Dr. McCafferty maintained that appellant's respiratory symptoms affected her cognitive impairment and substantially limited her ability to perform many of the major duties of her IT security and compliance manager position. She further maintained that her conditions were permanent. Dr. McCafferty indicated that appellant's symptoms would recur if she was exposed to substances again in her office. She advised that, based on available medical information it was unknown as to the effectiveness of reassigning appellant to work in another building. Dr. McCafferty recommended that an indoor air quality assessment be performed prior to considering such changes. She also recommended that appellant be allowed to recover by working at home for at least three months.

In a November 13, 2014 letter, Dr. Neal L. Presant, an occupational medicine consultant with FOH, reviewed documents related to appellant's request for reasonable accommodations due to her fragrance sensitivity. He noted, among other things, that her LinkedIn website page stated that, in addition to her employing establishment job, she was a skincare consultant for Jafra Cosmetics International. Dr. Presant indicated that it was impossible to determine whether appellant had a disability under the ADAA or Rehabilitation Act and there was no need to grant her request for reasonable accommodation for full-time telework. He noted that appellant told a nurse practitioner that she had difficulty being in shopping malls due to fragrance exposure. Dr. Presant maintained that her inability to perform her job functions in the presence of fragrances could not be reconciled with her ability to fly and use public transportation and her outside employment.

In response to OWCP's development questionnaire, appellant noted her attempts to minimize her exposure to fragrances at places outside of her employment which included her gym, worship center, and doctor's office, and the grocery store. She also minimized her exposure to fragrances at indoor social gatherings, technical training conferences, restaurants, and at home and while using public transportation and driving passengers in her car or cars from rental companies. Appellant indicated that she was being treated for seasonal allergies due to pollen. She related that her asthma and migraine symptoms developed over the past few years and became more profound and lasted longer as time progressed. Appellant maintained that she became symptomatic within a couple of hours of arriving at work. She kept her office door closed during the entire time she was at work.

Appellant submitted a January 27, 2014 medical report from Dr. Augusto C. Corella, a Board-certified internist. Dr. Corella noted appellant's symptoms and medical and social history. He discussed findings on examination and assessed sleep disorder, headache, dyspnea, tinnitus,

palpitations, chest pain, medically complex patient, ill-defined condition, and dizziness. On February 26, 2014 Dr. Corella noted treating appellant since January 27, 2014 for incapacitating headaches, dizzy spells, and blurry vision of unknown etiology, but which seemed associated with potential work environmental triggers such as fragrance or other causative agents. He noted that she reported clinically feeling better until her return to work earlier in the week when she became ill again. Dr. Corella recommended modifying her workbench environment to avoid and limit possible environment triggers and irritants as she continued to undergo a diagnostic workup.

In a February 12, 2015 letter, a nurse practitioner noted that appellant was under her care for migraines. She related that appellant was allowed to telework to reduce her fragrance/olfactory exposure indefinitely.

On a February 16, 2015 prescription note Dr. Rodrigo C. Hurtado, a Board-certified allergist and immunologist, indicated that appellant was seen on that day. He provided instructions for her return to work.

By decision dated July 29, 2015, OWCP denied appellant's occupational disease claim as the evidence of record was insufficient to establish that she actually experienced the employment factors alleged to have caused her claimed injury.

On July 27, 2016, appellant, through counsel, requested reconsideration. She contended that the evidence submitted was sufficient to establish that she experienced the claimed work exposure and that her diagnosed medical conditions were causally related to that exposure. Appellant submitted documents regarding her request for reasonable accommodation due to her fragrance sensitivity. In e-mails dated October 29, 2013 to July 18, 2014, she informed coworkers, including Dr. Milbanks, about the symptoms she had due to fragrance exposure at work. Appellant noted her resultant absence from work and medical treatment. The e-mails indicated that Dr. Milbanks accommodated appellant's condition by providing her assignments that did not require her to be in the office.

In a February 22, 2015 report, Dr. Hurtado noted his history of treating appellant's severe nasal congestion, dry cough, wheezing, severe fatigue, migraines, and difficulty concentrating. He also noted her additional medical treatment. Dr. Hurtado indicated that appellant had seasonal allergic rhinitis with a moderate elevation of IgE antibodies which were genetic. He noted that she started having asthma symptoms due to adverse reactions to volatile irritants soon after starting work at the employing establishment. Dr. Hurtado related that appellant had asthma at her workplace and an immunodeficiency involving a deficiency of immune globulin M antibodies and deficiency of specific respiratory antibodies. He maintained that her return to her workplace would worsen her condition. Dr. Hurtado advised that attempts should be made to find appellant a work environment with less crowds, more ventilated rooms, and no uncontrolled use of scents. He advised that avoidance to irritants was a necessity as exposures for several hours in a row would typically trigger her symptoms. Dr. Hurtado related that this was not the case with a short airplane flight because of the airplane's powerful ventilation system or with brief use of public transportation to and from work where there was substantial ventilation and influx of outside air. In an undated report and March 17, 2016 prescription, he recommended that appellant continue to work three days a week, every other day, at her workplace due to her asthma, immunodeficiency, and chemical sensitivity as he previously described. Appellant could only attend face-to-face

meetings when they were mandatory. Dr. Hurtado noted that appellant's symptoms were clearly worse at the workplace. He maintained that she not only had respiratory issues, but also the environment triggered migraines, dizziness, and cognitive symptoms. Nevertheless, Dr. Hurtado indicated that appellant's symptoms had improved with the use of special filters.

In reports dated March 28 and August 10 2015, Dr. Janine Van Lancker, an allergist and immunologist, noted that appellant had a history of asthma and rhinitis which was greatly exacerbated by exposure to scents and fumes such as, perfumes, air fresheners, etc. She recommended that appellant work in an environment free of such exposures as much as possible. Dr. Lancker also recommended that appellant have a carbon-activated air cleaner and that she wear a respirator mask at work.

A referral for follow-up care dated March 23, 2015 contained an unknown signature and indicated that appellant should seek further healthcare within three to seven days. She presented on that day with complaints of a foggy head and thoughts. Appellant had increased sensitivity to environmental irritants. She was currently seeing an allergist and her primary physician regarding this concern. Appellant was instructed to follow-up with her primary care physician regarding her health issue of environmental irritants.

On an April 6, 2015 prescription note Dr. Victoria H. Murphy, a Board-certified internist, indicated that appellant had multiple chemical sensitivity syndrome and should not be exposed to perfumes or strong cleaning chemicals. She requested that appellant be excused on April 8, 2015 for a doctor's appointment.

By report dated April 8, 2015, Dr. Corella noted his treatment of appellant for incapacitating headaches, dizzy spells, blurry vision, and difficulty breathing of unknown etiology, but which seemed to be associated with certain environmental triggers such as, fragrances and odors. Appellant reported that she was doing well until she returned to work where she could become abruptly ill. Dr. Corella noted that she had been advised by all of her specialists to avoid and limit potential environmental triggers and irritants.

In a patient work profile dated May 20, 2015, a nurse practitioner indicated that appellant was treated on that day. She recommended that appellant avoid working in her office and all chemical toxins to prevent headaches.

In an undated statement, appellant noted that she became symptomatic following her exposure to fragrance at grocery stores, indoor social gatherings, technical training conferences, restaurants, and a doctor's office. She also became symptomatic due to her exposure to fragrance while using public transportation, driving a passenger in her car, and driving a rental car, and when a neighbor dried clothes and a breeze blew the exhaust towards her window.

In a March 9, 2015 letter, Dr. Presant reviewed additional evidence and related that the conclusions in his previous letter remained unchanged. He questioned how appellant could sit in close proximity to passengers on a flight who may be wearing fragrances while she avoided shopping malls due to exposures to fragrances and odors. Dr. Presant also questioned why being in a private, well-ventilated room would not be adequate accommodation considering that she was also a skincare consultant, which would presumably put her in much closer proximity to fragrances

than an office environment. On April 27, 2015 he indicated that based on recent medical information, appellant had a disability as defined by the ADA.

In a March 18, 2015 letter, appellant responded to Dr. Presant's statements. She contended that she was not exposed to fragrance as a skincare consultant she interfaced primarily with Jafra Cosmetics International for the purpose of purchasing products at a consultant price, rather than a retail price. Appellant noted that she was able to use Jafra products they were for individuals with sensitive skin and did not contain fragrance. She further noted that during the past couple of years she had not done any new consultations, just occasional reorders. Appellant related that all Jafra products were ordered electronically and shipped. There were no retail outlets. Appellant again attributed her condition to exposure to fragrance at work.

By decision dated October 11, 2016, OWCP modified its July 29, 2015 decision to find that the claimed injury did not arise during the course of employment and within the scope of compensable work factors. It noted that the evidence clearly demonstrated that appellant had fragrance sensitivity in her everyday life and within her professional workplace. OWCP also noted that the employing establishment suggested that appellant could have been exposed to irritants while working as a skincare consultant for Jafra Cosmetics International.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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.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 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. The medical evidence required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable certainty, and must be supported by medial rationale

³ *Supra* note 2.

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).

explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁶

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish the alleged factors of her federal employment.

Appellant alleged that, she developed a chemical sensitivity as a result of her exposure to fragrances while performing her duties as an IT security compliance manager at the employing establishment. Appellant's statement that she sustained an occupational disease due to her federal employment, although entitled to great weight, is disputed by the employing establishment. Dr. Wilbanks, chief information security officer, maintained that while appellant asked her not to use fragrance, stated periodically that she was bothered by a coworker's fragrance, and periodically called into a meeting when she was bothered by an attendee's fragrance, she did not state that she could not work or use leave due to her reaction to fragrance. In response to appellant's assertion that she became ill after arriving at work and working for a short period of time in the office, Dr. Wilbanks related that she was exposed to numerous people and their fragrances while using public transportation to commute to work, travelling by air, and taking cruises. She maintained that while appellant claimed to have had an allergic condition for 10 years, there was no documentation indicating that appellant had informed the employing establishment about her condition at the start of her employment on November 8, 2010. Dr. Wilbanks further maintained that there was no documentation indicating that she required a private work area, or that, she was unable to attend in-person meetings. She related that appellant was not subjected to any potentially harmful substances at work. Dr. Wilbanks noted that she teleworked during the four-week period of office renovations and despite her claim upon completion of the renovation that fumes from new carpet and cleaning made her ill, air quality test results revealed improved air quality after the renovations. She disputed appellant's claimed date of injury as May 16, 2011, noting that appellant did not submit any medical documentation in support of her claim until April 2014.

Dr. Presant, an occupational medicine consultant with FOH, disputed appellant's alleged work exposure history. He noted that her LinkedIn website page stated that she not only worked at the employing establishment, but she also worked for Jafra Cosmetics International as a skincare consultant. Dr. Presant maintained that appellant's job as a skincare consultant presumably put her in much closer proximity to fragrances than an office environment. In addition, he noted that she had informed a nurse practitioner about her difficulty being in shopping malls due to fragrance exposure. Dr. Presant advised that appellant's inability to perform her job functions in the presence of fragrances could not be reconciled with her ability to fly and use public transportation and her outside employment. While Dr. McCafferty, an occupational medicine consultant with FOH, determined that appellant was disabled under the ADAA and Rehabilitation Act and that her request for reasonable accommodation to permanently work on a full-time basis at home due to her workplace fragrance sensitivity was substantiated by medical documentation, she did not specifically identify the substances which she believed caused her severe allergies and asthma,

⁶ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams, id.*

affected her cognitive impairment, and substantially limited her ability to perform many of the major duties of her IT security and compliance manager position.

Furthermore, the indoor air and water quality and odor and mold inspection reports dated June 1, 2011 to July 1, 2104 were essentially unremarkable, and did not address unacceptable indoor air or odor quality due to fragrances.

It is appellant's burden of proof to establish exposure to allergens in the performance of duty. The Board has previously held that appellant has not met her burden of proof if she has not submitted any factual evidence substantiating her allegations that she was exposed to specific allergens at the employing establishment and the employing establishment has submitted evidence to dispute her general allegations.⁷

The Board finds that appellant has not provided the necessary factual evidence to establish exposure to fragrance in the performance of duty. Appellant has not submitted any factual evidence substantiating her allegations that she was exposed to specific fragrances at the employing establishment and the employing establishment has submitted evidence to dispute her general allegations.⁸

On appeal counsel contends that appellant sustained an employment-related injury. The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty. Since she failed to establish the first component of fact of injury, it is not necessary to discuss whether she submitted medical evidence sufficient to establish that a medical condition existed and whether the condition was causally related to the alleged factors of her federal employment.⁹

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 the alleged factors of her federal employment.

⁷ *M.B.*, Docket No. 15-0638 (issued August 21, 2015); *S.B.*, Docket No. 08-2447 (issued November 20, 2009).

⁸ *Id.*

⁹ *Alvin V. Gadd*, 57 ECAB 172 (2005).

ORDER

IT IS HEREBY ORDERED THAT the October 11, 2016 decision of the Office of Workers' Compensation Programs is affirmed.¹⁰

Issued: April 5, 2018
Washington, DC

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

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

¹⁰ Colleen Duffy Kiko, Judge, participated in this decision, but was no longer a member of the Board effective December 11, 2017.