United States Department of Labor
Employees' Compensation Appeals Board

J.J., Appellant	)	
and	)	**Docket No. 17-1248**
	)	**Issued: February 21, 2018**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Savannah, GA, Employer	)	

Appearances:
Paul H. Felser, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 15, 2017 appellant, through counsel, filed a timely appeal from a November 29, 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.[3]

[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.*

[3] Appellant submitted additional evidence on appeal after the November 29, 2016 decision was issued. The Board s jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant met his burden of proof to establish an occupational disease in the performance of his federal employment duties.

FACTUAL HISTORY

On October 21, 2015 appellant, then a 34-year-old property and procurement specialist assigned to the laundry unit, filed an occupational disease claim (Form CA-2) alleging that he developed chronic pneumonia and a weakened immune system as a result of his federal employment duties. He reported that his duties included taking inmates out on the rear dock once a week to clean the deck. This cleaning process included removal of pigeon feces. Appellant stopped work on April 24, 2014 and had been hospitalized 12 times since November 2014 for pneumonia. He reported that his lab results revealed that he had pigeon feces and feathers in his system which had weakened his immune system, resulting in chronic pneumonia. Appellant first became aware of his condition and of its relationship to his employment on February 19, 2015. He stopped work on April 30, 2014. On the reverse side of the claim form J.P., appellant's supervisor, reported that appellant initially left work for an unrelated issue and his injury did not occur at work.

In a September 14, 2015 medical report, Dr. Maria Rudisill Streck, a Board-certified allergy and immunology physician, related that appellant was under her care for a history of recurrent pneumonia and hypersensitivity pneumonitis. She explained that the hypersensitivity pneumonitis, which was an inflammatory condition in the lungs, was specifically related to pigeon droppings which he was exposed to at the workplace. Dr. Streck reported that appellant must avoid all exposure to bird droppings, which were detrimental to his health.

In an October 30, 2015 memorandum, J.P. reported that appellant was assigned to the laundry department during the timeframe of his most recent alleged injury. Appellant's assignment was to monitor the daily operations of the laundry department which included supervising inmate workers in the operations of daily laundry duties. He noted that it had been identified that one day a week he, or another laundry staff member, was responsible for monitoring inmates clearing the rear dock which included trash pick-up as well as hosing off dirt and debris. Appellant reported having been required to clean pigeon feces off the rear dock yet this was something that would be required by the inmates with staff supervision. Therefore, J.P. reported no direct knowledge of appellant completing this task. However, if appellant was the only staff member in laundry to complete this task, he would have done it once per week. J.P. reported receiving statements from two staff members who worked during the same time frame with respect to their knowledge of any of appellant's exposures. He noted that there was a memorandum instructing that the employees from laundry were responsible for cleaning of the rear dock every Tuesday. While J.P. was the supervisor during this timeframe, he was unaware of this directive, but did not dispute its existence. He reported that appellant's last day of work was on April 23, 2014 when he reported a traumatic injury to his groin area under OWCP File

No. xxxxxx401.[4] An FCI Williamsburg Daily Cleaning Procedures for Pigeon Droppings was submitted.

In an October 30, 2015 e-mail correspondence, C.M., a coworker, informed J.P. that about 9 to 12 months ago they were asked by Safety for Commissary, Laundry, Food Services, and Facilities to pick one day during the week to help clean the rear dock which consisted of making sure trash, cardboard, pallets, etc. was removed, swept, and washed off.

In an October 30, 2015 memorandum, R.H., a material handler supervisor, reported that when he was transferred over to laundry, he was informed that there was a certain day that the laundry unit cleaned the back dock. He did not recall what they were required to clean as he had never cleaned the back dock.

In an October 30, 2015 memorandum, the employing establishment reported that appellant would have supervised the inmate detail cleaning the droppings and should not have been near the point of operation of the Taski machine. It reported that the process of daily cleaning of pigeon droppings entailed every precaution to ensure that employees were not exposed to any hazardous substances. A May 6, 2013 memorandum was submitted from the employing establishment which detailed that laundry was assigned to cleaning the rear dock on Tuesday of every week at 12:00 p.m. which consisted of sweeping the entire rear dock, including the compactor area.

By letter dated November 25, 2015, OWCP informed appellant that the evidence of record was insufficient to support that he actually experienced the incident or employment factor alleged to have caused injury, that there was no diagnosis of any condition, and that there was no physician's opinion as to the cause of his injury. It provided a development questionnaire for completion and requested that he submit a response in order to substantiate the factual basis of his claim. Appellant was afforded 30 days to provide the requested information.

In another letter dated November 25, 2015, OWCP requested that the employing establishment provide additional information pertaining to appellant's injury and occupational duties.

An official position description for supervisor mail handler and procurement and property specialist was submitted.

In a December 21, 2015 memorandum, the employing establishment reported that it did not concur with appellant's claim that he was exposed to pigeon feces while cleaning the rear dock area. It reported that the procedures in place for the cleaning of pigeon droppings were to remove any potential airborne hazard by wetting the surface area with a disinfectant, letting the solution stand for 10 minutes, then using an auto scrubber machine to apply additional solution, scrub the area, then vacuum up any debris. The auto scrubber was then emptied in the sanitary drain. The employing establishment reported that staff who supervise inmate workers cleaning these areas did so on an intermittent basis and should not be at the point of operation of the auto scrubber because inmate workers physically clean the area and were in close proximity to the

[4] The Board notes that the record contains no other information pertaining to this claim.

solution and debris. It noted that it did not have any reason to believe that appellant performed any task which resulted in his exposure to or contact with pigeon feces and feathers. Any task would have been performed by inmate workers with the staff member providing intermittent supervision. The employing establishment reported that cleaning the area daily prevented build-up, the airborne hazard was removed during the wetting process, and no personal protective equipment was required until the machine was emptied and cleaned, at which time latex gloves and goggles were utilized. It noted that additional personal protective equipment would be required if pressure washing overhead, however, such cleaning was not required and had not been conducted on the rear dock.

By decision dated January 5, 2016, OWCP denied appellant's claim finding that the evidence of record failed to establish that the occupational exposure occurred as alleged. It noted that he failed to respond to the November 25, 2015 OWCP questionnaire and provided no further statement or factual evidence as to how his federal employment duties caused or contributed to his condition.

On January 13, 2016 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

In support of his claim, appellant submitted a January 3, 2016 narrative statement responding to OWCP's developmental questionnaire. He alleged that his exposure occurred from September 2013 to April 2014 when he was assigned once a week to supervise the inmates cleaning the dock area. Every Tuesday, appellant would take several inmates outside and would help them pick up trash and clean up pigeon feces by throwing buckets of water on the feces to make it wash down the storm drain. This would take 30 minutes to an hour. Appellant noted that the pigeons would roost up in the rafters covering the loading dock. For clean up, they would use brooms, dustpans, and empty buckets and were provided no protective gear other than gloves. Appellant explained he was admitted into the hospital for diabetic ketoacidosis and was diagnosed with a possible bacterial infection as a result of his high sugar level. He was again admitted in November 2014 for pneumonia and subsequently admitted 12 more times when he was eventually advised by his physician that he had pigeon feathers and feces in his lungs and blood.

By letter dated February 5, 2016, the Occupational Safety and Health Administration (OSHA) requested that the employing establishment conduct a safety inspection at the workplace due to an alleged hazard reported: Employees and inmates are exposed to pigeon feathers, feces, and thick dust while performing cleanup of dock surfaces and are not provided with personal protective equipment. It noted that, while OSHA had not determined whether the hazard alleged existed and was not conducting an inspection at that time, it requested the employing establishment investigate the hazards and notify them of the situation. A response was requested by February 12, 2016.

In a September 12, 2016 medical report, Dr. Bhatraphol Tingpej, Board-certified in infectious disease, reported that appellant has underlying Type 1 diabetes and was admitted to the hospital in November 2014 with diabetic ketoacidosis and severe pneumonia. He described appellant's multiple hospitalizations due to recurrent respiratory symptoms, pneumonia, and hypoxemia. Dr. Tingpej reported that additional workup for recurrent pneumonia revealed his

underlying immunodeficiency status namely hypogammaglobulinemia (low immunoglobin level) and underlying hypersensitivity pneumonitis specifically to pigeon droppings/feces and environmental molds. He noted review of the OSHA report regarding appellant's exposure to pigeon droppings related to his workplace. Since November 2014, over the period of the past 21 months, appellant had been significantly debilitated and was unable to return to work. Dr. Tingpej opined that appellant should avoid ongoing exposure to pigeon droppings and molds as this would aggravate his pneumonia symptoms.

A hearing was held on September 14, 2016. Counsel argued that fact of injury was established as appellant was exposed to pigeon droppings. He argued that, at the least, the medical evidence supported an aggravation of a preexisting condition and objective testing confirmed that appellant had a hypersensitivity to pigeon feces and feathers.

In a September 14, 2016 medical report, Dr. Streck provided a detailed medical history regarding appellant's diabetes and respiratory conditions, noting that he was first hospitalized for pneumonia in November 2014. She reported that he last worked in April 2014 when he would take inmates weekly to clean pigeon droppings. Dr. Streck reported that lab work revealed an abnormal hypersensitivity to pneumonitis panel with elevated levels to pigeon droppings, phoma, penicillium, and Cladosporium. She diagnosed hypogammaglobulinemia, history of recurrent pneumonia, hypersensitivity pneumonitis panel positive to pigeon droppings, and Type 1 diabetes. February 20, 2015 lab results were also submitted which revealed findings of mixed feathers and pigeon droppings.

By decision dated November 29, 2016, an OWCP hearing representative affirmed the January 5, 2016 decision finding that the evidence of record failed to establish that the occupational exposure occurred as alleged.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] 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.[6] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.[7]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee

[5] *Supra* note 2.

[6] *Gary J. Watling*, 52 ECAB 278 (2001).

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

actually experienced the employment incident which is alleged to have occurred.[8] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[9]

When an employee claims an injury in the performance of duty he or she must submit sufficient evidence to establish a specific event, incident, or exposure occurring at the time, place, and in the manner alleged. He or she must also establish that such event, incident, or exposure caused an injury.[10] Once an employee establishes an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability from work, for which he claims compensation is causally related to the accepted injury.[11]

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast serious doubt on the employee's statements. The employee has not met his or her burden of proof when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.[12]

ANALYSIS

The Board finds that this case is not in posture for a decision.[13]

In its November 29, 2016 decision, OWCP found that appellant had not established that the occupational exposure occurred as alleged. The Board finds, however, that the evidence of

[8] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[9] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

[10] *See generally John J. Carlone*, 41 ECAB 354 (1989); *see also* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (1999) (occupational disease or illness and traumatic injury defined). *See Victor J. Woodhams*, 41 ECAB 345 (1989) regarding a claimant's burden of proof in an occupational disease claim.

[11] *Supra* note 7.

[12] *Betty J. Smith*, 54 ECAB 174 (2002).

[13] *M.C.*, Docket No. 15-1915 (issued June 17, 2016).

record is sufficient to establish that he was exposed to pigeon feces and feathers in his employment duties as a property and procurement specialist.[14]

On his Form CA-1, appellant stated that he was required to take inmates outside on the rear dock once a week to clean, which included the removal of pigeon droppings. In his January 3, 2016 narrative statement, he explained that his exposure occurred from September 2013 to April 2014 as he was assigned once a week to supervise the inmates cleaning the dock area. Every Tuesday, appellant would take several inmates outside and help them pick up trash and clean up pigeon feces by throwing buckets of water on the feces to make it go down the storm drain. He noted that the pigeons would roost up in the rafters covering the loading dock. For clean up, they would use brooms, dustpans, and empty buckets and were provided no protective gear other than gloves. The employing establishment controverted the claim arguing that appellant was only required to supervise the cleanup and had not been exposed to pigeon feces since he stopped work in April 2014.

The Board finds that appellant has provided sufficient detail to establish that an occupational exposure occurred as alleged.[15] While the employing establishment controverted the claim, they submitted evidence establishing that laundry, his unit, was assigned to cleaning the rear dock on Tuesday of every week. They further submitted an FCI Williamsburg Daily Cleaning Procedures for Pigeon Droppings, corroborating appellant's allegations that cleanup of the dock included removal of pigeon droppings. The Board notes that, although he was not hospitalized until November 2014 for pneumonia, the record establishes that he was exposed to pigeon feces and feathers in his employment duties as a property and procurement specialist. As such, contrary to OWCP's findings, appellant's statements do not cast such inconsistencies as to doubt that the employment exposure occurred as alleged.[16] Thus, the Board finds that, given the above referenced evidence, appellant has alleged with specificity that the occupational exposure occurred as alleged.[17]

Given that appellant has established exposure to pigeon droppings and feathers in his employment as a property and procurement specialist, the Board finds that the first component of fact of injury, the claimed exposure, occurred as alleged.[18] As such, the question becomes whether the medical evidence establishes a causal relationship between the claimed conditions and the identified employment exposure. Appellant has submitted medical evidence which has not been evaluated by OWCP. OWCP procedures specify that a final decision of OWCP must include findings of fact and provide clear reasoning which allows the claimant to understand the precise defect of the claim and the kind of evidence which would tend to overcome it.[19] As it

[14] *A.R.*, Docket No. 15-1716 (issued November 17, 2015).

[15] *See B.B.*, 59 ECAB 234 (2007). An employee's statement alleging that an incident or exposure 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.

[16] *A.J.*, Docket No. 12-0548 (issued November 16, 2012).

[17] *See Willie J. Clements*, 43 ECAB 244 (1991).

[18] *James R. Flint*, Docket No. 05-0587 (issued June 10, 2005).

[19] *See L.R.*, Docket No. 15-0255 (issued April 1, 2015); *see also* 20 C.F.R. § 10.126.

found that appellant did not establish fact of injury, it did not analyze or develop the medical evidence. Thus, the Board will set aside OWCP's November 29, 2016 decision and remand the case to OWCP to enable it to properly consider all of the evidence.[20] After further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's occupational disease claim.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: February 21, 2018
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

[20] *T.F.*, Docket No. 12-0439 (issued August 20, 2012).