United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
and	)	**Docket No. 17-1520**
	)	**Issued: February20, 2018**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Waymart, PA, 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 July 3, 2017 appellant filed a timely appeal from a January 18, 2017 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 his burden of proof to establish total disability commencing December 7, 2015, causally related to his accepted October 22, 2015 employment injury.

FACTUAL HISTORY

On October 24, 2015 appellant, then a 41-year-old correctional treatment specialist, filed a traumatic injury claim (Form CA-1) alleging that, on October 22, 2015, he sustained an acute

[1] 5 U.S.C. § 8101 *et seq.*

allergic reaction to mold in the course of his federal employment.[2] A supervisor advised that appellant stopped work on October 22, 2015. On December 15, 2015 OWCP accepted appellant's claim for aggravation of an acute allergic reaction to mold.[3]

In an attending physician's report (Form CA-20) dated October 28, 2015, a medical provider with an illegible signature, diagnosed an allergy, noting that appellant had experienced an asthmatic reaction after being exposed to mold. The provider noted that appellant was advised not to return to work.

In a note dated November 18, 2015, Dr. Eckardt Johanning, Board-certified in occupational medicine, opined that appellant was temporarily totally disabled until December 31, 2015, pending further evaluation.

On December 3, 2015 appellant filed a claim for compensation (Form CA-7) for leave without pay from December 7 through 20, 2015. Subsequently, he filed claims for compensation (Form CA-7) for leave without pay from December 20, 2015 through March 26, 2016 and from April 10 through August 13, 2016.

By development letter dated December 15, 2015, OWCP noted that appellant had stopped work on October 22, 2015 and had not yet returned. It stated that, while he had requested compensation for leave without pay commencing December 7, 2015, he had not submitted sufficient evidence to establish total disability from work for the entire claimed period. OWCP requested that appellant provide a report from a physician explaining how his disability was related to his accepted injury of October 22, 2015.

In a work capacity evaluation (Form OWCP-5b) dated December 23, 2015, Dr. Johanning related that appellant was unable to return to work to prevent possible future injury from work in a moldy or damp environment. He further noted that appellant's anti-allergy medication may make him drowsy.

In a report dated January 7, 2016, Dr. Johanning, Board-certified in occupational medicine, explained that, after working at the employing establishment, appellant developed symptoms of coughing, difficulty breathing, shortness of breath, throat and skin irritation, swelling of the neck, hoarse voice, loss of smell, nosebleeds, headaches, excessive fatigue, and eye swelling. He related that the employing establishment had recurrent leaks, excessing

[2] In a letter dated October 29, 2014, Dr. Barry Minora, a specialist in internal medicine, noted that appellant's office, F195, had tested for the highest mold concentration in an initial environmental report. The initial environmental report, dated October 14, 2014, supported Dr. Minora's assessment, noting more spores of various types in appellant's office, F195, than in other locations.

In an environmental monitoring study dated January 20, 2015, an industrial hygienist examined the premises of the employing establishment and concluded that the post-remediation air samples on premises were not elevated when compared to outdoor concentrations. The report did not include results for appellant's office, F195. In a letter dated April 14, 2015, appellant noted that he had received a copy of the air quality tests and that his own office had not been included in the study, despite his office having the highest concentrations on an initial air quality test.

[3] The record reflects that appellant has an August 1, 2008 occupational disease claim which was accepted for allergic rhinitis (temporary) under OWCP File No. xxxxxx930.

dampness, and hygiene and mold problems. Dr. Johanning noted that, despite medication, appellant still suffered recurrent flare-ups of his respiratory symptoms. He had requested a detailed industrial hygiene inspection in order to ensure appellant's symptoms were not due to continued exposure, but that no such investigation had yet been performed. Dr. Johanning diagnosed environmental lung disease with reactive airway disease, chronic rhino-sinusitis, and mold allergy.

OWCP referred appellant for a second opinion evaluation to determine whether he had residuals of the accepted condition and whether he could return to work. In a second opinion evaluation dated January 13, 2016, Dr. Michael Nekoranik, a Board-certified internist and pulmonologist, diagnosed severe chronic and allergic rhinitis and sinusitis related to mold exposure in appellant's workplace. He indicated that, since appellant was away from his work environment after October 22, 2015, his symptoms and chronic rhinitis had improved significantly, but were still present. Dr. Nekoranik opined that appellant's condition would worsen if he continued to have exposure to mold at his workplace, but that he was not totally or partially disabled from any other employment.

By letter dated January 16, 2016, Dr. Johanning diagnosed environmental lung disease with reactive airway disease, chronic rhino-sinusitis, and mold allergy. He noted that appellant was medically removed from work until February 16, 2016.

By decision dated February 19, 2016, OWCP denied appellant's claim for compensation for leave without pay commencing December 7, 2015. It found that he had not submitted medical reports with sufficient rationale linking his disability to the accepted condition.

On March 15, 2016 appellant requested an oral hearing before an OWCP hearing representative.

In a work capacity evaluation dated March 23, 2016, Dr. Johanning concluded that appellant could not return to work because he had not been accommodated with a new work location. He reissued essentially the same evaluation with the same recommendations on August 17, 2016.

The hearing was held on November 3, 2016. Appellant described his employment history with the U.S. Justice Department and his job duties as a correctional treatment specialist. He noted that he was unable to perform the duties of his employment position and the lack of a modified job offer.

By decision dated January 18, 2017, the hearing representative affirmed the February 19, 2016 OWCP. She found that appellant had not submitted any rationalized medical evidence in support of his contention that he was totally disabled at any period subsequent to December 7, 2015 causally related to his accepted condition of aggravation of an acute allergic reaction to mold.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[5] For each period of disability claimed, the employee has the burden of proof to establish that he was disabled from work as a result of the accepted employment injury.[6] Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.[7]

Under FECA, the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[8] When the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wages.[9] The Board has held that the fear of future injury however is not compensable.[10]

ANALYSIS

OWCP accepted appellant's claim for aggravation of an acute allergic reaction to mold on December 15, 2015. Appellant thereafter filed claims for compensation for leave without pay for the period December 7, 2015 and continuing.

By decision dated February 19, 2016, OWCP denied appellant's claim for compensation for leave without pay commencing December 7, 2015. It found that he had not established that he was totally disabled due to the accepted condition of aggravation of acute allergic reaction to mold.

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

In a report dated January 7, 2016, Dr. Johanning, appellant's treating physician, related that, despite medication, appellant still suffered recurrent flare-ups of his respiratory symptoms. In a work capacity evaluation dated March 23, 2016, he indicated that appellant could not return to work because he had not been accommodated with a new work location.

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[4] *Supra* note 1.

[5] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel A. Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

[6] *See Amelia S. Jefferson, id.*; *see also David H. Goss*, 32 ECAB 24 (1980).

[7] *See Edward H. Horton*, 41 ECAB 301 (1989).

[8] *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

[9] *Merle J. Marceau*, 53 ECAB 197 (2001).

[10] *See G.B.*, Docket No. 07-1525 (issued November 13, 2007).

OWCP then referred appellant for a second opinion evaluation with Dr. Nekoranik. In a report dated January 13, 2016, Dr. Nekoranik diagnosed appellant with severe chronic and allergic rhinitis and sinusitis related to mold exposure in his workplace. He concluded that, since appellant had been out of his work environment after October 22, 2015, his symptoms and chronic rhinitis had improved significantly, but were still present. Dr. Nekoranik opined that appellant's condition would worsen if he had exposure to mold at his workplace, but that he was not totally or partially disabled from any other employment.

An employee is entitled to receive compensation for periods of disability related to an aggravation of an underlying condition. An employee is not entitled to compensation for periods of disability where the aggravation is temporary and leaves no permanent residuals. This is true even though the employee is found medically disqualified to continue in such employment because of the effect that employment factors may have on his underlying condition. Under such circumstances, the employee's disqualification for continued employment is due to the underlying condition without any contribution by the employment.[11] However, as previously noted when the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wages.[12]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[13] As OWCP undertook development of the evidence by referring appellant to a second opinion physician, it has the duty to secure an appropriate report addressing the relevant issues.[14]

Dr. Nekoranik's second opinion medical report related that appellant continued to have residuals of the accepted injury and that his condition would worsen if he has exposure to mold at his workplace, but that he could perform other employment. His report requires clarification as to whether residuals from appellant's accepted condition, or the fear of future injury disabled appellant from a return to work.

The Board, therefore, will remand the case for OWCP to obtain a supplemental report from Dr. Nekoranik addressing whether residuals of accepted condition disabled appellant from a return to his date-of-injury position. After this and any further development deemed necessary, it should issue a *de novo* decision.

CONCLUSION

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

[11] *See D.M.*, Docket No. 11-0386 (issued February 2, 2016).

[12] *Supra* note 9.

[13] *See William J. Cantrell*, 34 ECAB 1223 (1983).

[14] *See D.V.*, Docket No. 16-1853 (issued April 14, 2017).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 18, 2017 is set aside and this case is remanded to OWCP for further proceedings consistent with this opinion.

Issued: February 20, 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