

contaminants, including asbestos, at the World Trade Center site after the September 11, 2001 terrorist attacks. OWCP accepted that he sustained allergic rhinitis, irritant-induced asthma, and smoke inhalation. It paid appellant received wage-loss compensation on the daily rolls from June 1, 2005 to February 28, 2006.

On September 12, 2007 OWCP granted appellant a schedule award for permanent impairment of his lungs totaling 50 percent.

In a July 11, 2014 letter, received by OWCP on July 17, 2014, appellant requested that his accepted conditions be expanded to include the additional condition of melanoma skin cancer. He noted that the condition had been accepted by the World Trade Center Health Program (WTCHP) as a result of his work-related exposure, but that he had not yet received any medical treatment or compensation from the WTCHP. Appellant attached a June 20, 2014 document in which an official from the WTCHP indicated that his claim for “melanoma of skin, site unspecified” had been certified as covered for medical benefits.

Appellant submitted an October 30, 2014 report in which Dr. Gwen S. Skloot, an attending Board-certified internist, diagnosed asthma and melanoma in situ of face. Dr. Skloot noted that appellant reported that the melanoma was surgically resected in December 2013.

In a letter dated December 1, 2014, OWCP requested that appellant submit additional factual and medical evidence in support of his claim. Appellant was afforded 30 days to respond with the requested evidence.

Appellant submitted a December 23, 2013 report in which Dr. Christopher J. Miller, an attending Board-certified dermatologist, indicated that, on that date, he performed Mohs surgery of a malignant melanoma in situ of the right zygomatic cheek. Dr. Miller noted that the lesion was present as a tan spot since March 2013 and subsequently darkened and enlarged.

In a May 30, 2014 report, Dr. Laura Crowley, an attending Board-certified pulmonologist, indicated that appellant was claiming coverage for “melanoma of skin, site unspecified.” She noted that he reported that, between September 14 and December 30, 2001, he spent 636 hours at the World Trade Center site performing duties related to perimeter security and search and rescue. Dr. Crowley noted that appellant’s occupational exposures included dust, chemicals, fumes from fires, and diesel exhaust. She determined that appellant’s exposure to airborne toxins, hazards, and adverse conditions resulting from the September 11, 2001 terrorist attacks were substantially likely to be a significant factor in aggravating, contributing to, or causing a condition on the list of health conditions related to the World Trade Center.²

In February 2015, OWCP referred appellant to Dr. Jordan Zuckerman, a Board-certified dermatologist, for a second opinion examination and opinion regarding whether he sustained melanoma due to his work exposure to the environmental conditions at the World Trade Center site.

² In a report dated March 24, 2015, Dr. Skloot again provided the diagnoses of asthma and melanoma in situ of face.

In a report dated March 9, 2015, Dr. Zimmerman indicated that appellant reported that he worked at the World Trade Center site for three months between September and December 2001. Appellant reported that he had a blistering sunburn on his cheeks and forehead in late October or November 2001. Dr. Zuckerman noted that his examination revealed a well-healed scar on appellant's right cheek secondary to the melanoma in situ that was excised in 2013. He noted that he believed that appellant's melanoma in situ was not related to his work injury of September 15, 2001. Dr. Zimmerman advised that, after reviewing the literature and speaking to a doctor at the World Trade Center Mount Sinai office, he felt that there had been no evidence gathered over the last 14 years that associated airborne particles produced from the September 11, 2001 terrorist attack with the appearance of melanoma. He noted, "I feel the melanoma of the skin is not referable or associated with the work incident of September 15, 2001, as stated by the patient." Dr. Zimmerman noted that it was possible appellant developed the melanoma due to sun exposure preceding 2001, but that there was a possibility that the sunburn he reported as occurring in late-2001 might have hastened the development or brought out the melanoma on his cheek that was excised in 2013. He noted that the cause and effect of appellant's condition was very difficult to ascertain, since melanomas occur frequently on people's faces, whether they were exposed to the World Trade Center environment in 2001 or not. Dr. Zimmerman noted that the fact that appellant developed a melanoma in situ 12 years after exposure to the environment at the World Trade Center site indicated that there was not a clear direct cause and effect. He noted, "In summary, there is not sufficient clinical evidence to support expansion of the claim to include melanoma in situ."

By decision dated May 26, 2015, OWCP denied appellant's request to expand his accepted conditions to include the additional work-related condition of melanoma. It found that the evidence of record from appellant's attending physicians, including that of Dr. Crowley, was of limited probative value and that the opinion of Dr. Zimmerman, OWCP's referral physician, showed that appellant's melanoma was not work related.

On August 7, 2015 appellant requested reconsideration of the May 26, 2015 decision and criticized the March 9, 2015 report of Dr. Zimmerman.

Appellant submitted a July 20, 2015 Attending Physician's Report (Form CA-20) in which Dr. Michael A. Crane, an attending Board-certified internist, provided the diagnoses of asthma and melanoma in situ of the face. Dr. Crane checked a box marked "Yes" indicating that the diagnosed conditions were caused or aggravated by the employment activity and noted that in October 2001 appellant had developed blistering skin on his face (with sunburn and peeling) "from outside exposure during his service."³ Appellant also submitted copies of communications sent between him and his congressional representative.

By decision dated October 13, 2015, OWCP denied modification of its May 26, 2015 decision denying appellant's request to expand his accepted conditions to include the additional work-related condition of melanoma of the skin. It found that the newly submitted medical evidence of Dr. Crane was of limited probative value.

³ In the disability portion of the form, Dr. Crane noted that appellant had retired. The date of such retirement is not clear from the record. In a June 22, 2015 narrative report, Dr. Crane diagnosed asthma and history of melanoma.

On December 7, 2015 appellant requested reconsideration of the October 13, 2015 decision.

In a November 6, 2015 report, Dr. Crane indicated that appellant reported working at the World Trade Center site for 636 hours between September 14 and December 30, 2001. Appellant reported developing blistering under his eyes, skin peeling, and a sunburn on his face around October or November 2001 which then resolved. Dr. Crane indicated that appellant further reported that in March 2013 a tan spot presented on his cheek which darkened and enlarged. He discussed the excision of the melanoma in December 2013. Dr. Crane noted that, during the period September 14 to December 30, 2001, appellant was exposed to concrete in the pit/pile, dust, chemicals, fumes from cutting and/or burning, sewage, hydrogen sulfide, smoke from fires, diesel exhaust, ergonomic risk factors, heat/cold, and noise as a direct result of the September 11, 2001 terrorist attacks. He noted, "Given the nature of [appellant's] exposure, it is within a reasonable degree of medical certainty that his condition is causally related to his time as a special agent at the disaster site."

By decision dated March 3, 2016, OWCP denied modification of its October 13, 2015 decision denying appellant's request to expand his accepted conditions to include the additional work-related condition of melanoma of the skin. It again found that the newly submitted medical evidence of Dr. Crane was of limited probative value.

In a letter dated August 22, 2016, appellant requested reconsideration of the March 3, 2016 decision.

In an August 18, 2016 report, Dr. Orit Markowitz, an attending Board-certified dermatologist, indicated that appellant reported that, between September 14 and December 30, 2001, he spent 636 hours working at the World Trade Center site. He noted that, given his significant exposure to hazardous substances at the World Trade Center site, it was his belief that appellant was at high risk for developing subsequent malignancies, such as malignant melanoma. Dr. Markowitz noted that melanoma was one of the deadliest cutaneous malignancies and was thought to be multifactorial in etiology. Well known risk factors for melanoma include sunlight/ultraviolet light exposure, presence of abnormal moles, fair skin, family history of melanoma, and immunosuppression. Dr. Markowitz found that the working conditions during the many hours appellant worked at the World Trade Center site led to significant ultraviolet light exposure, and likely caused immunosuppression given the hazardous material that he was actively immersed in. He noted, "In light of all this, while there is no one direct cause of melanoma, I do believe that the melanoma that he developed many years later was a result of his risk factors from his involvement with the [World Trade Center] event."

By decision dated December 9, 2016, OWCP denied modification of its March 3, 2016 decision denying appellant's request to expand his accepted conditions to include the additional work-related condition of melanoma. It found that the newly submitted medical evidence of Dr. Markowitz was of limited probative value.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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 timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any specific condition or disability for which compensation is claimed is causally related to the employment injury.⁵ In general the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury.⁶ This meaning, for brevity, is expressed as disability from work.⁷

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁸

Section 8123(a) of FECA provides in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”⁹ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁰

ANALYSIS

OWCP accepted that, on September 15, 2001, appellant sustained allergic rhinitis, irritant-induced asthma, and smoke inhalation due to exposure to environmental conditions at the World Trade Center site after the September 11, 2001 terrorist attacks. In a July 11, 2014 letter, appellant requested that his claim be expanded to include the additional condition of melanoma skin cancer. OWCP denied appellant’s request for expansion of the claim, noting that he had not submitted sufficient medical evidence in support of his claim.

⁴ *Supra* note 1.

⁵ *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

⁶ *See* 20 C.F.R. § 10.5(f).

⁷ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002); *see also A.M.*, Docket No. 09-1895 (issued April 23, 2010).

⁸ *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

⁹ 5 U.S.C. § 8123(a).

¹⁰ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

The Board finds that there remains an unresolved conflict in the medical opinion evidence between OWCP's referral physician, Dr. Zimmerman, and appellant's attending physicians, Dr. Crane and Dr. Markowitz, regarding whether appellant's melanoma condition was due to the work exposure at the World Trade Center site.

In a report dated March 9, 2015, Dr. Zimmerman indicated that appellant reported that he worked at the World Trade Center site for three months between September and December 2001. He noted that he believed that appellant's melanoma in situ was not related to his work injury of September 15, 2001. Dr. Zimmerman advised that, after reviewing the literature and speaking to a doctor at the World Trade Center Mount Sinai office, he felt that there had been no evidence gathered over the last 14 years that associated airborne particles produced from the September 11, 2001 terrorist attack with the appearance of melanoma. He noted, "I feel the melanoma of the skin is not referable or associated with the work incident of September 15, 2001, as stated by the patient." Dr. Zimmerman noted that it is possible appellant developed the melanoma due to sun exposure preceding 2001, but there was a possibility that the sunburn he reported as occurring in late-2001 might have hastened the development or brought out the melanoma on his cheek that was excised in 2013. He noted that the cause and effect of appellant's condition was very difficult to ascertain, since melanomas occur frequently on people's faces, whether they were exposed to the World Trade Center environment in 2001 or not. Dr. Zimmerman noted, "In summary, there is not sufficient clinical evidence to support expansion of the claim to include melanoma in situ."

In contrast, Dr. Crane and Dr. Markowitz determined that appellant's melanoma condition was related to his exposure to the environmental conditions at the World Trade Center site.

In a November 6, 2015 report, Dr. Crane indicated that appellant reported working at the World Trade Center site for 636 hours between September 14 and December 30, 2015. He also noted that appellant reported developing blistering under his eyes, skin peeling, and a sunburn on his face around October or November 2001. Dr. Crane indicated that, during the period September 14 to December 30, 2001, appellant was exposed to concrete in the pit/pile, dust, chemicals, fumes from cutting and/or burning, sewage, hydrogen sulfide, smoke from fires, diesel exhaust, ergonomic risk factors, heat/cold, and noise as a direct result of the September 11, 2001 terrorist attacks. He indicated, "Given the nature of [appellant's] exposure, it is within a reasonable degree of medical certainty that his condition is causally related to his time as a special agent at the disaster site."

In an August 18, 2016 report, Dr. Markowitz indicated that appellant reported that, between September 14 and December 30, 2001, he spent 636 hours working at the World Trade Center site. He found that the working conditions during the many hours appellant worked at the World Trade Center site led to significant ultraviolet light exposure, and likely caused immunosuppression given the hazardous material that he was actively immersed in. Dr. Markowitz noted, "In light of all this, while there is no one direct cause of melanoma, I do believe that the melanoma that he developed many years later was a result of his risk factors from his involvement with the [World Trade Center] event."

Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence between Dr. Zimmerman and appellant's attending physicians, Dr. Crane and Dr. Markowitz, regarding whether his melanoma condition was due to

the work exposure at the World Trade Center site.¹¹ On remand OWCP should refer appellant, along with the case file and a current statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on this matter. After carrying out this development, it should issue a *de novo* decision regarding appellant's claim for expansion of the accepted conditions.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 9, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: March 19, 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

¹¹ See *supra* notes 8 and 9.