

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

_____)	
R.H., Appellant)	
)	
and)	Docket No. 18-0840
)	Issued: November 19, 2018
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PATROL,)	
Frederiksted, VI, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 13, 2017 appellant filed a timely appeal from a November 6, 2017 merit decision and a February 6, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish an occupational disease in the performance of duty; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C § 8128(a).

FACTUAL HISTORY

On April 26, 2017 appellant, then a 53-year-old supervisor, filed an occupational disease claim (Form CA-2) alleging that she experienced dizziness, extreme lethargy, and headaches as the result of mold spore exposure at work. She noted that she first became aware of her claimed condition on March 23, 2017, but did not realize the connection to her work until later on April 11, 2017, when she stopped work.

By development letter dated May 24, 2017, OWCP informed appellant that additional information was necessary to establish her claim, including a detailed description of the employment-related activities that she believed caused or contributed to her condition, as well as rationalized medical evidence establishing causal relationship. It provided a questionnaire for her completion and afforded appellant 30 days to submit the requested information. No response was received.

By decision dated November 6, 2017, OWCP denied appellant's claim, finding that she failed to identify the work factors, duties, or exposure alleged to have caused or contributed to her claimed injury. Additionally, it found that she had not submitted medical evidence containing a medical diagnosis in connection with such work events.

On January 19, 2018 appellant requested reconsideration and submitted medical evidence in support thereof.

An April 11, 2017 duty status form (Form CA-17) by Dr. John Charles Perez, a treating physician specializing in internal medicine, noted that appellant was exposed to mold at work. He diagnosed conjunctivitis, allergic reaction to mold, and nasal drainage. Appellant was released to return to work with restrictions limiting her physical work activities and exposure to fumes and noise, effective April 17, 2017.

Dr. Perez, in an August 4, 2017 attending physician's report (Form CA-20), diagnosed chronic rhinitis with occupational exposure to mold, hematuria, multinopolar thyroid goiter, and hypertensive nephropathy. He checked a box marked "yes" to the question of whether the conditions had been caused or aggravated by factors of her federal employment. In support of this opinion, Dr. Perez noted that appellant had an insidious allergic reaction to environmental mold exposure.

By decision dated February 6, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim.

LEGAL PRECEDENT -- ISSUE 1

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, 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.⁶

Appellant's burden of proof includes the submission of a detailed description of the employment factors or conditions which he or she believes caused or adversely affected a condition for which compensation is claimed.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish an occupational disease in the performance of her federal employment duties.

Appellant has not provided sufficient evidence to establish that an occupational exposure occurred. Her claim form generally stated that she experienced dizziness, extreme lethargy, and headaches due to mold spore exposure. Appellant provided no explanation as to where she was exposed to mold at work or the length of time she was allegedly exposed. As she provided no explanation as to how the duties of her federal employment exposed her to mold, she has not established the factual component of her claim.⁸

By a May 24, 2017 development letter, OWCP informed appellant that the evidence received was insufficient to establish that she experienced any employment factors that were

³ *Supra* note 1.

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).

⁶ *T.C.*, Docket No. 17-0872 (issued October 5, 2017).

⁷ *T.B.*, Docket No. 17-0444 (issued May 5, 2017).

⁸ *See M.L.*, Docket No. 12-0957 (issued December 7, 2012).

alleged to have caused an injury. It asked her to provide a detailed description of the employment-related activities that she believed contributed to her condition. OWCP provided a questionnaire for appellant's completion, so that she could substantiate the factual elements of her claim. Appellant did not provide the necessary information prior to the issuance of OWCP's November 6, 2017 decision.⁹ Accordingly, the Board finds that she has not met her burden of proof to establish fact of injury in the performance of duty.¹⁰

As appellant has not established an injury in the performance of duty, she has not met her burden of proof.

On appeal, appellant asserts the evidence submitted establishes her claim, as her physician opined that she was very susceptible to mold exposure and testing showed the indoor air quality was not acceptable where she was stationed. However, as she has not established the factual component of her claim, the Board will not address the medical evidence with respect to causal relationship.¹¹

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.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹² OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹³

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁴ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁵ If the request is timely, but fails to meet at least one

⁹ See *L.B.*, Docket No. 18-0411 (issued September 12, 2018).

¹⁰ *Supra* note 8.

¹¹ *S.S.*, Docket No. 18-0242 (issued June 11, 2018).

¹² 5 U.S.C. § 8128(a).

¹³ 20 C.F.R. § 10.606(b)(3); see also *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁴ *Id.* at § 10.607(a).

¹⁵ *Id.* at § 10.608(a); see also *M.S.*, 59 ECAB 231 (2007).

of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On February 6, 2018 appellant requested reconsideration of OWCP's November 6, 2017 decision which denied her occupational disease claim. The underlying issue on reconsideration is factual in nature -- whether she established mold exposure at work.

In her December 21, 2017 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advanced a new and relevant legal argument not previously considered. Thus, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of reconsideration. In support of the request for reconsideration OWCP received an April 11, 2017 Form CA-17 and an August 4, 2017 Form CA-2. This evidence is not relevant to the underlying factual issue as it does not address the underlying issue of whether appellant established actual exposure to mold at work. Evidence which does not address the particular issue under consideration does not constitute a basis for reopening a case.¹⁷

The Board accordingly finds that appellant failed to meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an occupational disease in the performance of duty. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁶ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁷ *See K.T.*, Docket No. 15-1916 (issued February 1, 2016).

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2018 and November 6, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 19, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board