United States Department of Labor
Employees' Compensation Appeals Board

S.T., Appellant	)	
and	)	**Docket No. 18-0412**
	)	**Issued: October 22, 2018**
DEPARTMENT OF THE NAVY, MARINE CORPS, Quantico, VA, Employer	)	

Appearances:
Stephen D. Scavuzzo, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 20, 2017 appellant, through counsel, filed a timely appeal from an October 2, 2017 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.

[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 has met her burden of proof to establish intermittent disability during the period August 22, 2014 through March 10, 2016 causally related to her accepted employment-related conditions.

FACTUAL HISTORY

On April 9, 2015 appellant, then a 42-year-old program analyst, filed an occupational disease claim (Form CA-2) alleging that she sustained allergic rhinitis and environmentally-induced asthma as a result of exposure to mold in her work location in Building 2010. She attributed her condition to mold from an air conditioning unit, leaking building pipes, and rain leakage. Appellant first became aware of her claimed condition and realized its relation to factors of her federal employment on May 30, 2012. On August 30, 2016 OWCP accepted the claim for permanent aggravation of asthma and permanent aggravation of allergic rhinitis. The employing establishment indicated that, through the years, appellant had been relocated to other offices. On March 10, 2016 it removed her from work for cause.[3]

On September 22, 2016 appellant filed a claim for wage-loss compensation (Form CA-7) for the period August 22, 2014 through March 10, 2016.

The evidence of record reveals that appellant was initially treated by Dr. Vandana Palagirl, an internist, for allergic rhinitis due to workplace exposure on May 30, 2012. Dr. Palagirl recommended that appellant not be further exposed to the environmental allergens. She recommended that appellant be allowed to work from home or be relocated to another facility until her condition improved or until her workplace was cleared of the existing allergens.

Appellant was seen at Stafford Hospital on August 22, 2014 for syncope and chest pain. She was discharged on August 23, 2014 with diagnoses of chest pain and syncope likely due to psychological stress and anemia.

In his initial report of February 27, 2015, Dr. Alan S. Chanales, a pulmonologist, related that appellant had respiratory problems before beginning work at a new location in August 2009, however, by 2010 her symptoms had worsened. He indicated that there had been obvious and worsening mold conditions at her employing establishment, which were addressed in an environmental report. Dr. Chanales also noted that, in August 2014, appellant had suffered a myocardial infarction and had been off work except for a brief time in November when she had returned to work and her respiratory symptoms worsened. He opined that she appeared to have suffered a workplace environmentally-induced asthma condition due to the obvious mold problem at her employing establishment. Dr. Chanales further opined that appellant should never return to that environment.

Additional progress reports from Dr. Chanales indicated that appellant's asthma and rhinitis were due to her work exposure and she could never return to her previous work

[3] Appellant was removed from employment due to failure to follow instructions, unauthorized absence, and inappropriate conduct.

environment. In a March 17, 2015 note, he indicated that it was "cruel and unfair" to consider her absent without leave given her health status. In a June 30, 2015 note, Dr. Chanales indicated that, since appellant had not been back to the workplace, Building 2010, her asthma was quiescent with full functionality and there was no need for medication. He opined that she could not return to her previous workplace at Building 2010 as every time she had done so in the past, her asthma had worsened. Dr. Chanales concluded that appellant needed to work in a location which was free from mold and other contaminants and irritants.

In a September 18, 2015 report, Dr. Chanales indicated that appellant was working two days a week at home and that the employing establishment was waiting for another environmental report. He noted that her asthma from exposure to mold in her workplace was quiescent as long as she was not exposed to mold. Dr. Chanales continued to opine that appellant could not return to her place of employment. He recommended that she be allowed to telework for five days a week or be transferred to another location which did not have a contamination problem.

On August 5, 2016 OWCP referred appellant for a second opinion examination. In an August 18, 2016 report, Dr. Peter Birk, a Board-certified internist and pulmonologist and an OWCP referral physician, reported her history of injury. He noted that appellant began to experience respiratory symptoms while working in employing establishment Building 2010 in May 2012 and that considerable mold was found in her office ceiling and ducts. Dr. Birk indicated that she was transferred to Building 3101 and she continued to have symptoms. Appellant then worked at the Davis Building and was asymptomatic. She was transferred back to Building 3101 and her symptoms resumed. Dr. Birk indicated that, despite abatement and a mold survey at the building, appellant continued to have symptoms. He noted that she was admitted to Stafford Hospital on August 22 to 23, 2014 for chest pain and syncope. Dr. Birk noted that appellant's workup was negative and that it was felt there was a psychological stress component. Appellant reported that she was asymptomatic when she worked from home and while she was working in the Davis Building. She also reported that she was terminated from employment on March 10, 2016.

Dr. Birk reviewed the medical record and noted examination findings. He opined that appellant's diagnosed allergic rhinitis and asthma conditions were causally related to her work and that she had a permanent aggravation to allergens each time she was exposed to Buildings 2010 or 3101. Dr. Birk concluded that, as her only limitation occurred when she was exposed to allergens in Buildings 2010 or 3101, she could not work in those buildings. He noted that appellant was able to work in the Davis Building or at home. Dr. Birk completed a work capacity evaluation for cardiovascular/pulmonary conditions (OWCP-5b) form and indicated that she could not work in employing establishment Building 2010.

By development letter dated October 6, 2016, OWCP advised appellant that additional evidence was necessary to establish disability for work during the period claimed from August 22, 2014 through March 10, 2016 causally related to her accepted employment injury. It requested that she submit additional evidence to establish a worsening of her accepted employment-related conditions such that she was no longer able to perform the duties of her position when she stopped work on August 22, 2014. OWCP afforded appellant 30 days to submit the necessary evidence.

In a December 14, 2016 letter, counsel related that the medical evidence in support of disability had already been submitted. He alleged that the reports of record clearly indicated that appellant was not permitted to return to work due to mold that had never been removed from her worksite. Counsel also alleged that the employing establishment had not accommodated her. No new medical reports were received.

By decision dated January 12, 2017, OWCP denied appellant's claim for wage-loss compensation for the period August 22, 2014 through March 10, 2016. It found that she had not submitted any evidence in support of her claim for wage loss and that the employing establishment had indicated in its November 15, 2015[4] letter that "accommodations were made for your restrictions as provided by the second opinion examiner Dr. Birk." OWCP noted that Dr. Birk had concluded that appellant was able to perform all duties described as long as she was not required to work in Building 2010 or "3010." It further noted that the employing establishment's letter dated November 18, 2015 had indicated that accommodations had been made for her to work in Building 2350 and/or 3101.

On February 7, 2017 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

In a July 17, 2017 letter, appellant's representative in Equal Employment Opportunity and Merit Systems Protection Board (MSPB) claims appellant had filed, provided a timeline of her reasonable accommodations in her employment which he advised was from his prehearing statement in her MSPB case. He advised that, from August 2013 until August 2014, the employing establishment moved her at least seven times to various workplaces in Buildings 3101 and 3250. On August 29, 2014 appellant submitted a reasonable accommodation request for telework and submitted reports from Dr. Chanales. On November 25, 2014 the employing establishment issued a decision on her August 29, 2014 reasonable accommodation request and instructed her to return to work in Building 2010. On or about March 1, 2015, an air quality test in Building 2010 was conducted and determined to be "Health Risk Assessment Code 4 (minor)." On May 24, 2015 the employing establishment proposed appellant's removal. On June 25, 2015 the employing establishment directed her to report for duty in Building 2010 and to reengage in the reasonable accommodation process. On July 13, 2015 appellant submitted a reasonable accommodation request and asked for "reassignment to a work location free of mold, contaminants and irritants." On July 31, 2015 she provided medical documentation from Dr. Chanales. On August 12, 2015 the employing establishment instructed appellant to telework two days per week. On September 9 and October 6, 2015 it requested additional medical documentation. Appellant submitted additional reports from Dr. Chanales on September 18, October 13, and December 23, 2015. On January 7, 2016 the employing establishment instructed her to report for duty in Building 2010.

A telephonic hearing was held on July 18, 2017. Appellant testified that she only worked in two Buildings 2010 and 3101. She indicated that there was no Building 3010 and that she never had an accommodation or worked in Building 2350. Appellant testified that she could not work in either Building 2010 or 3101 because of the mold. She testified that, on August 31, 2014 and August 12, 2015, the employing establishment directed her to telework two days a week and then

[4] There is no November 15, 2015 letter of record. OWCP appears to be referring to the employing establishment's letter of November 18, 2015.

placed her on involuntary leave without pay on Monday, Wednesday, and Friday. Appellant also testified that her employment was terminated on March 10, 2016. Counsel argued that she was disabled because she could not work in Buildings 2010 and 3101.

By decision dated October 2, 2017, an OWCP hearing representative affirmed the prior decision. The hearing representative found that there was insufficient medical evidence to establish that appellant's claimed disability during the period August 22, 2014 through March 10, 2016 was causally related to the accepted work conditions. The hearing representative advised that accommodations were made based on her restrictions, as related by Dr. Birk, that she could not work in Buildings 2010 and 3101.

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 that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[6]

Under FECA the term disability is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[7]

Whether a particular injury causes an employee to be disabled from work and the duration of that disability are medical issues which must be proven by a preponderance of the reliable, probative, and substantial medical evidence.[8]

The Board will not require OWCP to pay compensation for disability without any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[9]

ANALYSIS

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

OWCP accepted appellant's occupational claim for permanent aggravation of asthma and permanent aggravation of allergic rhinitis. Dr. Birk, OWCP's second opinion physician, had concluded that she was able to perform all of her employment duties, except that she could not work in employing establishment Buildings 2010 or 3101 due to the presence of allergens. OWCP denied appellant's claim for wage-loss compensation from August 22, 2014 through March 10,

[5] *Supra* note 2.

[6] *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *G.T.*, Docket No. 07-1345 (issued April 11, 2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[7] *See Prince E. Wallace*, 52 ECAB 357 (2001).

[8] *See Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).

[9] *See S.J., supra* note 6*; Fereidoon Kharabi*, *id*.

2016, finding that the medical evidence of record was insufficient to establish total disability as a result of her accepted conditions. It noted that the employing establishment's letter dated November 18, 2015 had indicated that accommodations were made for her to work in Building 2350 and/or 3101. On October 2, 2017 an OWCP hearing representative affirmed the January 12, 2017 decision. The hearing representative noted that the employing establishment had advised that accommodations were made based on appellant's restrictions, which Dr. Birk had indicated as not being able to work in Buildings 2010 and 3101.

OWCP's regulations state in pertinent part: Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage loss claimed on a CA-7 to the extent that evidence contemporaneous with the period claimed on a CA-7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available.[10]

The Board notes that OWCP's hearing representative concluded that the employing establishment did not require appellant to work in Buildings 2010 and 3101. The record reflects that on August 22, 2014, she was taken by ambulance from her workplace in Building 3101 to the hospital and she was out of work from August 22 through November 16, 2014. Appellant briefly returned to work in Building 3101 and then stopped work after November 19, 2014. At some point, however, she resumed teleworking for two days a week.[11] The record reflects that appellant had requested several reasonable accommodation requests to which the employing establishment had issued several responses which directed her to return to work in Building 2010. Her restrictions, however, precluded her from working in Buildings 2010 and 3101.

Section 20 C.F.R. § 10.126 requires OWCP to issue a decision containing findings of fact and a statement of reasons.[12] OWCP erred in its October 2, 2017 decision by failing to discuss or analyze the evidence of record and hearing testimony as to where and when appellant was directed to work during the claimed period of disability.

It is incumbent upon OWCP to review all of the evidence of record and make findings based upon the evidence of record. OWCP should make findings as to whether appellant met her burden of proof to establish whether entitlement to wage-loss compensation during the period August 22, 2014 through March 10, 2016.[13] Accordingly, the case will be set aside and remanded for consideration of the factual evidence pursuant to the standards set out in section 20 C.F.R. § 10.126. After such further development as OWCP deems necessary, it shall issue a *de novo* decision to protect appellant's appeal rights.

[10] 20 C.F.R. § 10.500.

[11] In her hearing testimony, appellant verified that she teleworked for two days per week, but indicated that this occurred on August 31, 2014 and August 12, 2015.

[12] 20 C.F.R. § 10.126.

[13] *See Tia L. Love*, 40 ECAB 586 (1989).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 2, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 22, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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