United States Department of Labor
Employees' Compensation Appeals Board

K.B., Appellant	)	
and	)	**Docket No. 18-1548**
	)	**Issued: March 11, 2019**
FEDERAL HOUSING FINANCE AGENCY, Washington, DC, Employer	)	

Appearances:
Jessica Rogers, 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 August 8, 2018 appellant, through counsel, filed a timely appeal from a March 1, 2018 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 that she sustained a respiratory condition in the performance of duty, as alleged.

FACTUAL HISTORY

On June 24, 2015 appellant, then a 57-year-old administrative office manager, filed a traumatic injury claim (Form CA-1) alleging that, on June 15, 2015, she experienced respiratory problems, headaches, coughing, wheezing, chest tightness, and asthma after working in an area that had been flooded with water. She stopped work on June 16, 2015.

Dr. Jan Iffat, Board-certified in family medicine, evaluated appellant on June 17, 2015. She diagnosed an exacerbation of mild intermittent asthma and released her to resume work without limitations.

On June 26, 2015 Dr. Alia Malik, Board-certified in family medicine, related that appellant had sustained an exacerbation of asthma beginning June 2015 following the collapse of a ceiling at her place of employment.[3] She found that her difficulty breathing had lessened, but that she continued to experience "headache and nasal congestion whenever she goes into the office." Dr. Malik noted that the employing establishment had cleaned the ceiling after the collapse and was currently cleaning up the mold. She diagnosed allergic rhinitis and intermittent asthma.

In a report dated August 3, 2015, Dr. Erik C. Osborn, a Board-certified internist, obtained a history of appellant experiencing shortness of breath, dyspnea on exertion, fatigue, lightheadedness, chest pressure, and difficulty concentrating after a ceiling collapsed at work. He found wheezing on examination. Dr. Osborn recommended that appellant use a continuous positive airway pressure (CPAP) machine.

Dr. Malik, on September 28, 2015, evaluated appellant for an exacerbation of asthma. She indicated that humidity "seem[ed] to trigger her symptoms…." Dr. Malik noted that appellant had not worked since July 2015. She diagnosed persistent asthma with exacerbation.

In a report dated October 21, 2015, Dr. Malik diagnosed severe, persistent asthma with an acute exacerbation and unspecified allergic rhinitis. She found that appellant could return to work without limitations. In an October 23, 2015 note, Dr. Malik related that her symptoms had begun after a ceiling at work collapsed in June 2015.

An analysis of the air quality in appellant's work space, performed on December 23, 2015, revealed the presence of fungal spores at a lower level than in the outside air.

[3] Dr. Malik, on June 29, 2015, opined that appellant had asthma and should "avoid mold as it exacerbates her symptoms." She noted that another physician had excused her from work from June 17 to 19, 2015.

Appellant, in a January 11, 2016 e-mail message, requested that the employing establishment evaluate her cubicle as the carpet had a moldy smell and the ceiling tiles had black spots.

In a report dated January 13, 2016, Apex Companies (Apex) related that on October 13, 2015 it had inspected an area of the employing establishment around Suite 112, including office 1126, after a water leak from a sprinkler pipe on October 12, 2015. Subsequent to blowing the area with fans, it had obtained moisture readings. Apex advised that a green reading meant the area was dry and a yellow or red reading indicated the presence of moisture. It had measured drywall readings and carpeting in cubicle areas as red zone moisture readings. Apex recommended that the employing establishment add blower fans, replace drywall, and possibly replace carpeting.

Apex related that it had performed a follow-up inspection on December 23, 2015. It found that the moisture meter readings taken of the carpeting and drywall were in the green zone in all affected areas. Apex submitted air samples to send to a laboratory for analysis. It determined that the indoor concentration of mold spores was significantly less than the mold spores from outdoor air samples, which by industry practice meant that the air quality was acceptable. Apex advised that the indoor air had low concentration of Myxomycetes spores that were not present in the outdoor air. It indicated that such spores were "common indoors and are associated with indoor plants, rotting lumber, and in conjunction with dust." Apex summarized the results from the laboratory analysis. It noted that it had not observed water damage or mold growth in the affected area, and that the carpeting, ceiling tiles, and drywall in appellant's work area were in the green zone. Apex advised that its findings were valid only for the date and time that it performed its service.

On February 5, 2016 Dr. Rodrigo C. Hurtado, Board-certified in allergy and immunology, noted that appellant had asthma by history that had worsened after she was exposed to water damage in her office at work on two occasions. He noted that after June 2015 she had used bronchodilators and nebulizers that had failed to control her condition unless she avoided her work space. Dr. Hurtado diagnosed allergic asthma.

In a progress report dated March 17, 2016, Dr. Hurtado opined that appellant had experienced asthma, multiple sinus infections, and extreme fatigue following floods in her office area in two separate locations. He indicated that she had received treatment in the emergency room approximately six times and was on several medications. Dr. Hurtado diagnosed asthma and immunodeficiency.

On March 23, 2016 Dr. Hurtado evaluated appellant after she had worked in the office for the previous three days.[4] On examination he found bilateral wheezing and decreased airflow with no rales. Dr. Hurtado advised that a pulmonary function test (PFT) showed severe obstruction and that her forced expiratory volume had "drastic[ally] dropped from last week." He diagnosed asthma.

[4] Dr. Hurtado, on March 25, 2016, noted that appellant's symptoms had lessened after she had been off work for two days. He diagnosed asthma and rhinosinusitis.

In a report dated July 25, 2016, Dr. Osborn found that appellant had severe asthma and allergies that required medication. He related, "[Appellant's] allergies and asthma have become worse since her workplace exposures. The environmental report has been reviewed and clearly shows that the environment of her workplace is making her asthma and her allergies worse. Due to her asthma, it is better that she avoids the workplace."

Dr. Malik, in an August 16, 2016 letter, indicated that appellant had a history of mild allergies and asthma until a ceiling collapsed at her work location on June 16, 2015. Her symptoms increased at work even with medication. Dr. Malik noted that appellant had used leave under the Family and Medical Leave Act (FMLA) "to allow her to fully recover until her office was moved to a new building." She continued to have symptoms in the new building, which "was old and had a lot of dust, prompting her to go to the ER [emergency room]." Dr. Malik related that even with medication appellant had wheezing, shortness of breath, a cough, and hoarseness, and noted that she had experienced a syncopal event in a metro station in April 2016. She advised that appellant should avoid her work environment as it triggered her allergies and asthma.

On November 19, 2016 Dr. Hurtado advised that appellant had a history of asthma previously controlled with the occasional use of an inhaler. He related:

> "[Appellant's] complaints coincide with two water damage incidents at her work sites from a HVAC [heating, ventilation, and air conditioning] water release in June 2015 and the break of [a] sprinkler opening in October 2015. [Appellant] was out of work from July to October [2015], she got better while being off work. While she was off work, her coworkers were moved to another office site. About two weeks before returning to work there was water damage in her new office from the break of a sprinkler opening. Ever since these two water damage incidents happened, her symptoms' escalation became worse and out of control."

Dr. Hurtado noted that appellant had experienced exacerbations of her asthma, infections, hives, chronic sinus symptoms, muscle aches, coughs, and migraines, and had sought emergency treatment over six times. He related that she had improved while at home over the weekend, but that her condition had worsened after a few hours at work. Dr. Hurtado opined that appellant had severe asthma that had worsened as a result of exposure to her work environment, and also had "developed disabling migraines, urticarial (hives) and chronic symptoms of allergic rhinosinusitis, which worsen at her workplace." He recommended that appellant relocate to an environmentally sound building or, if that was not an option, retire.

By letter dated December 23, 2016, appellant, through counsel, requested that OWCP reopen her workers' compensation claim and adjudicate the claim as an occupational disease rather than a traumatic injury. She advised that she had sustained an exacerbation of a respiratory condition when her building had experienced a flood over the weekend of June 13, 2015 causing the ceiling tiles to collapse. When appellant had resumed work on June 15, 2015, she had experienced respiratory problems, including asthma, chest tightness, headaches, and coughing. She used leave under the FMLA from July to October 2015. Appellant's workstation had relocated to another location in October 2015. Two weeks before she was scheduled to resume work, the new location had flooded and, following her return to work, she had experienced another exacerbation of her condition. Counsel reviewed the medical evidence and asserted that the

opinions of Dr. Malik and Dr. Hurtado supported that her employment duties exacerbated her respiratory condition.

In a January 31, 2017 development letter, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's statements. It further requested the results of air quality testing.

In a February 1, 2017 development letter, OWCP advised appellant that it had paid a limited amount of medical expenses as her claim was uncontroverted and appeared minor, but was now formally considering her claim. It requested that she provide additional factual and medical information in support of her claim, including a detailed description of the workplace exposure that she believed had contributed to her condition and a reasoned report from her attending physician addressing the relationship between any diagnosed condition and work factors.

In a February 14, 2017 addendum, Dr. Hurtado opined that, based on appellant's history, the findings on examination, and the results of diagnostic testing, she had experienced an exacerbation of allergic rhinosinusitis and asthma due to her employment exposure. He related:

> "Both of the work environments [appellant] has worked in since June 15, 2015 have experienced significant water damage incidents that can have a significant and lasting effect on the overall air quality leading to the introduction of new and additional environmental allergens and pollutants. When a person with asthma or allergies is exposed to an environmental trigger such as an allergen or pollutant (*i.e.,* odors, mold, or damp environments, insects, dust, or cold air), this can cause the airways and nasal passages to become inflamed, narrow, and fill with mucous, causing an exacerbation of asthma and allergic rhinosinusitis and continue to exacerbate these conditions when she returns to these environments. [Appellant] repeatedly tried to return to work only to experience an exacerbation of her symptoms."

Dr. Hurtado opined that the mechanism of injury was "consistent with the exacerbation of [her] condition," noting that her symptoms began upon exposure to her office environment. He related that based on the objective findings that appellant's "continued exposure to her work environment since June 15, 2015 has exacerbated her asthma and allergic rhinosinusitis."

Appellant, in a February 24, 2017 response, related that a flood had occurred in her work space the weekend before June 15, 2015. When she returned to work on June 15, 2015 the ceiling, carpet, and her chair were saturated with water and covered with debris, and the area smelled moldy and musty. Cleaning up after the flood took a long time and even after cleanup the "carpet was still wet, the odor was not completely gone, and there were water stains on the ceiling tiles in the open office area." Appellant's allergies worsened and she sought treatment on June 17, 2015. She was off work from June to October 2015. Appellant's office relocated, but on October 26, 2015, two weeks before she was scheduled to resume work, a sprinkler pipe had flooded her work area. She related:

> "During an on-site inspection right after the floor, there were excessive moisture readings throughout Suite 112, where my cubicle was located. Despite this 'clean

> up,' there were still ongoing issues from the flood when I returned to work two weeks later. Some ceiling tiles developed stains or black spots on them, there was a green color in the carpet where the flood happened, and the office smelled moldy and like rotten eggs."

Appellant further advised that the employing establishment had provided her with an air purifier on December 21, 2015 that did not help. She had filed for retirement in November 2016. Appellant specified that she was claiming an occupational disease rather than a traumatic injury.

By decision dated March 9, 2017, OWCP denied appellant's claim, finding that she had not established an injury in the performance of duty. It determined that she had established the occurrence of the implicated work factors, but had failed to establish an injury in the course of her employment as she had not provided evidence establishing that she was exposed to unsafe levels of mold and dust. OWCP noted that an environmental study found the presence of Myxomycetes, but had attributed the presence of the fungus to indoor plants. It also noted that the medical evidence submitted was insufficient to support that appellant sustained a medical condition due to the compensable employment factors.

Thereafter, OWCP received a June 30, 2015 report from Applied Environment, Inc. regarding its evaluation of the air quality at appellant's work location on June 18, 2015. It had determined that the air quality was within acceptable limits with lower fungal spore concentrations inside than those measured outside. Applied Environmental had found moisture on carpet tiles, wet drywall, and missing ceiling tiles in one office and moisture on the wall separating two offices. It indicated that it had found no "visible mold growth or odors typically associated with such growth" during its inspection. Applied Environment also advised that the humidity measurements for the air in the building had been within normal limits. It provided measurements for fungal spores obtained on June 18, 2015 and advised that the "[f]ungal spores in the concentrations measured would not be anticipated to adversely affect normal healthy individuals."

Appellant further submitted an April 25, 2016 air quality analysis showing the presence of fungal spores and particulates, including Myxomycetes.

In a February 27, 2017 e-mail message, V.R., a supervisor, related that the ceiling tile fell around June 14, 2015. No one had witnessed the incident, but she believed that appellant's statement regarding the occurrence was accurate. V.R. did not know if there were any substances that were harmful present, but indicated that she had provided three air sample reports. She related that the employing establishment had provided appellant with an air purifier and a mask as accommodations.

In a report dated August 11, 2017, Dr. Karen Kaufman, an osteopath Board-certified in allergy and immunology and internal medicine, indicated that she had begun treating appellant after Dr. Hurtado retired in April 2017. She related:

> "Both of the work environments [appellant] have worked in since June 15, 2015 have experienced significant water damage incidents that can significantly impact the condition of patients with underlying asthma, allergic rhinitis, or vasomotor rhinitis, and in air sample analysis, mold spores have been identified. Even

> exposure to mold spores in the workplace environment can negatively impact the overall health of sensitized individuals like [appellant], and the ability to control exacerbations of asthma and rhinitis can be very difficult in the setting of repeated exposure because of her sensitization. By reviewing her chart and history, she has had recurrent flares of her asthma and rhinitis every time she would return to her work environment, and symptoms would improve upon her return home."

Dr. Kaufman advised, "Based on a thorough review of [appellant's] history, physical exam[ination] findings, results of testing, and a review of prior evaluations of her workplace, it is my professional medical opinion that exposure in her workplace environment starting June 15, 2015 have contributed to exacerbation of her underlying asthma and mixed rhinitis."

Appellant, through counsel, on December 14, 2017 requested reconsideration. She asserted that medical evidence from Dr. Kaufman established that work factors had aggravated her respiratory condition. Counsel asserted that appellant had established exposure to environmental triggers in her work space, including wet carpeting and drywall in her office suite, elevated moisture readings, and the presence of mold spores.

By decision dated March 1, 2018, OWCP denied modification of its March 9, 2017 decision. It found that the evidence of record was insufficient to establish that appellant sustained an injury in the performance of duty as she failed to submit air quality testing showing unsafe levels of mold and dust in her work environment.

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 an occupational disease.[7]

In an occupational disease claim, appellant's burden requires submission of the following: (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.[8]

[5] 5 U.S.C. § 8101 *et seq*.

[6] *J.I.*, Docket No. 18-0286 (issued September 17, 2018).

[7] *A.J.*, Docket No. 18-0905 (issued December 10, 2018).

[8] *R.M.*, Docket No. 18-0976 (issued January 3, 2019); *P.D.*, Docket No. 17-1885 (issued September 17, 2018).

The medical evidence required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable 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 employee.[9]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.[10] The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.[11]

OWCP's procedures provide that the claims examiner should refer the case to a second opinion physician when it has gathered all the medical evidence from the attending physician and does not have enough evidence about a diagnosis or an adequately reasoned opinion about causal relationship to accept the case, but does have sufficient evidence to suggest that the claimant might be entitled to benefits.[12]

ANALYSIS

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

Initially, the Board notes that appellant alleged that her injury occurred due to exposure to work factors occurring over more than one work shift, and thus her claim is for an occupational disease.[13]

OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that she had been exposed to hazardous levels of mold or dust. She has established, however, that her work area in June 15, 2015 had been flooded, causing a ceiling tile to collapse and spread debris around the office. On June 18, 2015 Applied Environment evaluated the work space and found moisture on the carpet, drywall, and some walls. It indicated that fungal spore measurements were within acceptable levels and would not adversely affect normal individuals. Appellant has also established that a second work location had flooded in October 2015, two weeks before she began working in that location. Apex evaluated the area on October 13, 2015 and found moisture readings in the red zone on drywall and carpeting. An air quality report also found an indoor concentration of mold spores significantly less than that of the outside air and a low concentration of Myxomycetous mold spores not present in the outside air. While appellant has

[9] *P.Y.*, Docket No. 18-1136 (issued January 7, 2019).

[10] *A.J.*, Docket No. 18-0905 (issued December 10, 2018).

[11] 20 C.F.R. § 10.121.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluation Medical Evidence*, Chapter 2.810.9.b(1) (June 2015).

[13] A traumatic injury is defined as a "condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift." 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift." 20 C.F.R. § 10.5(q).

not demonstrated exposure to unhealthy levels of mold at work, the Board finds that she has established that she worked in two offices that flooded resulting in her exposure to water in the carpet and drywall prior to cleanups and debris from a fallen ceiling tile.

Given that appellant has established the employment exposures, the question becomes whether these exposures caused an injury.[14] Thus, the Board will set aside OWCP's March 1, 2018 decision and remand the case for consideration of the medical evidence. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* final decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: March 11, 2019
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

[14] *R.E.*, Docket No. 17-0547 (issued November 13, 2018).