United States Department of Labor
Employees' Compensation Appeals Board

E.C., Appellant	)	
and	)	**Docket No. 19-0854**
	)	**Issued: October 17, 2019**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Canandaigua, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 14, 2019 appellant, through counsel, filed a timely appeal from a September 24, 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 a diagnosed medical condition causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 20, 2015 appellant, then a 57-year-old recreation therapist, filed an occupational disease claim (Form CA-2) alleging an allergic reaction and respiratory distress resulting from exposure to cleaning chemicals while in the performance of duty. She noted that she first became aware of her conditions and their relationship to her federal employment on July 2, 2015. Appellant contended that, following her December 14, 2014 employment injury, she returned to work in an alternate-duty assignment at an offsite facility where she experienced the same symptoms she had previously experienced on December 14, 2014.[4] She stopped work on July 13, 2015.

By development letter dated August 14, 2015, OWCP informed appellant that the evidence submitted was insufficient to establish her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. A separate development letter of even date was sent to the employing establishment requesting that a knowledgeable supervisor respond as to the accuracy of appellant's allegations and to provide further evidence. OWCP afforded both her and the employing establishment 30 days to respond.

In a response dated September 14, 2015, an employing establishment human resources (HR specialist)/workers' compensation specialist concurred with appellant's allegations. She noted that appellant had worked outside of its facilities in an alternate-duty mobile unit as a recreation therapist due to appellant's previously accepted claim. The HR specialist related that appellant worked eight hours a day on the days that appellant became ill with respiratory distress due to her exposure. She noted that appellant had just returned to work following her accepted December 14, 2014 employment injury. The HR specialist also related that the alternate-duty assignment was created for appellant to minimize the effects of her exposure.

A letter dated April 8, 2015 by Dr. Anatole Kleiner, a physician Board-certified in allergy and immunology, was received. He noted that appellant presented for evaluation of respiratory symptoms and related a history that her symptoms began in December 2014 and that she had been out of work since January 2015. Dr. Kleiner reported findings on physical examination and skin

[3] Docket No. 18-0186 (issued May 2, 2018).

[4] OWCP assigned the present claim OWCP File No. xxxxxx804. Appellant had a prior claim, assigned OWCP File No. xxxxxx227, which was originally filed as a claim for a December 14, 2014 traumatic injury, but later converted to an occupational disease claim. OWCP accepted OWCP File No. xxxxxx227 for extrinsic asthma with acute exacerbation (airway hyperreactivity syndrome induced by chemical inhalation). Appellant returned to work on June 22, 2015 in a full-time alternate-duty assignment in the same classified position as a recreation therapist following her accepted December 14, 2014 employment injury. Her claims have been administratively combined.

and spirometry testing and provided impressions of shortness of breath, cough, and other adverse effects not elsewhere. He related that appellant's history was suggestive of possible asthma occurring due to exposure to irritating floor containing compounds. Appellant did not have any baseline asthma or allergic disease. Dr. Kleiner pointed out that, unfortunately, there was no way to test for "IgE-mediated allergy" to the ingredients of the floor cleaning solutions. In any case, he advised that "IgE-mediated allergy" was unlikely in this case. Dr. Kleiner maintained that, more likely, appellant was having issues related to irritant properties of the aforementioned properties. He noted that this could only be confirmed by means of controlled exposure along with measurement of pulmonary function, which his office was not set up to perform.

A medical report dated May 4, 2015 by Dr. Mark J. Utell, an attending Board-certified internist with a subspecialty in pulmonary disease, was also received.[5] He noted that appellant presented for evaluation of work-related systemic and respiratory symptoms related to her workplace exposure. Dr. Utell further noted that her diagnoses included respiratory symptoms, most consistent with irritant-induced airway hyperreactivity and upper respiratory symptoms secondary to exposure to irritants. He indicated that these conditions were work related. Dr. Utell further indicated that appellant denied any history of respiratory disease or allergies prior to her December 14, 2014 employment injury. He noted that she related a history of this injury and medical treatment. Appellant also related that when she returned to work she became symptomatic again. Dr. Utell indicated that, at the present time, she remained asymptomatic as long as she avoided the environment at the employing establishment. He reported findings on physical examination and reviewed diagnostic test results. Dr. Utell provided an impression that appellant had no history of prior respiratory or allergic disease. On December 14, 2014 appellant inhaled an agent that was used for revitalizing floor surfaces in a work area. She immediately became symptomatic with respiratory and upper airway symptoms. The symptoms were of a severity that appellant was sent from work to the emergency room on one occasion. She had developed symptoms on multiple occasions while working at the employing establishment and had not been able to tolerate her workplace. Appellant was placed on a federal disability program in January 2015 and had done extremely well as long as she avoided the indoor environment at work. Dr. Utell opined that she had developed a syndrome best described as airway hyperreactivity induced by chemical inhalation. He related that appellant had no history of preexisting allergy and it seemed unlikely that this was based on an immunological sensitivity. Dr. Utell asserted that it was much more likely that she had developed an irritant response and had become sensitive to a cleaning agent and perhaps other inhaled strong odors. Appellant had been intolerant to her indoor workplace ever since the time of injury and developed acute symptoms over the subsequent six months virtually every time she returned to the employing establishment. Dr. Utell noted that in these types of clinical situations with intolerance of an indoor environment, it was virtually impossible to determine the specific chemical agent that was causing the symptoms. Appellant's skin tests to inhaled allergens were negative. It seemed unlikely that she had an allergy *per se* and her symptom complex was more typical of an irritant respiratory response. Dr. Utell related that, in looking over the safety data sheets (SDS) for the workplace materials, there were some chemicals that had been associated with respiratory irritation. There was virtually no place that

[5] Dr. Utell's May 4, 2015 report was first received under OWCP File No. xxxxxx227 on May 29, 2015. As noted above, OWCP accepted appellant's claim for extrinsic asthma with acute exacerbation (airway hyperreactivity syndrome induced by chemical inhalation) under that file number on June 11, 2015.

was doing challenge testing with chemicals these days due to concerns for acute symptomatology with exposure as well as other liability concerns. Thus, there was simply no mechanism or test for identifying the specific chemical or chemicals which appellant needed to avoid. Dr. Utell recommended that appellant wear a mask in the workplace, noting, however, that this would not be an acceptable alternative for dealing with patients or clients given her job responsibilities as a recreational therapist. He concluded that she should not continue to work in the employing establishment's buildings.

On September 18, 2015 appellant responded to OWCP's August 14, 2015 development questionnaire. She contended that an unknown exposure caused her issues. Appellant related that her and her physicians' best guess was that the cause was industrial or aerosol cleaning chemicals. She indicated that her exposure occurred each time she walked through halls, and a building and facility. The exposure lasted as long as appellant could stand it/continue to breathe or was sent home/to an emergency room by the employee health unit. She indicated that no protective equipment was made available or offered to her. Appellant described her symptoms, which included watering eyes, shortness of breath, and hoarseness that continued until she could barely breathe. Her symptoms worsened when she stayed in the building/area that triggered the attack. Fresh air improved her condition. Appellant related that no treatment had been effective in controlling her condition. She could not remember the exact date her condition began, but it was in December 2014. Appellant maintained that her condition was continuous as there was no time that it did not occur when she entered various facilities. She related that her exposure occurred while on assignment at an off-site, nonfederal facility after bathrooms were cleaned. Appellant noted that she had no previous similar conditions.

In a witness statement dated September 18, 2015, appellant's coworker indicated that she saw appellant having a reaction to something on two separate occasions. She related that no one else appeared to be affected by what was bothering her.

In a follow-up visit report dated July 6, 2015, Dr. Utell performed a follow-up examination for appellant's work-related respiratory symptoms most consistent with irritant-induced airway hyperreactivity and upper respiratory symptoms secondary to exposure to irritants. He discussed findings on physical examination. Dr. Utell continued to opine that appellant developed airway hyperreactivity induced by chemical inhalation, again noting that she had no history of allergies. He indicated that she had done quite well at work for several weeks until an air supply cleaning agent was used which resulted in her exposure and developing acute symptoms. Dr. Utell advised that appellant could work as long as she avoided exposure to aerosolized or spray cleaning agents.

In a work restriction form dated October 19, 2015, an unknown provider with an illegible signature from Finger Lakes Occupational Health Services, noted that appellant may not return to work in the employing establishment environment. Appellant could not be exposed to cleaning materials.

On November 18, 2015 appellant filed a notice of recurrence (Form CA-2a) alleging that she sustained of recurrence of total disability on July 2, 2015 due to her accepted December 14, 2014 employment injury. She explained that because she was unable to return to an employing establishment facility due to her reaction to chemicals used in her work area, she was assigned to

off-site facilities where she was exposed to chemical cleaning products which caused her respiratory symptoms to recur.

In support of her recurrence claim, appellant submitted a report dated October 19, 2015 in which Dr. Utell continued to opine that she developed airway hyperreactivity induced by chemical inhalation and that she had an intolerance to a number of work-related cleaning agents.

On December 7, 2015 OWCP determined that appellant's recurrence claim should be adjudicated as a new occupational disease claim and assigned OWCP File No. xxxxxx670. However, on March 18, 2016 it deleted the claim under OWCP File No. xxxxxx670 because it had created two separate cases for the same injury. OWCP moved the documents from that case record into the case under OWCP File No. xxxxxx804.

In a development letter dated February 8, 2016, OWCP again requested that the employing establishment provide comments from a knowledgeable supervisor on the accuracy of all statements provided by appellant relative to her occupational disease claim. In an addendum to its development letter, it requested that she respond to the employing establishment's September 14, 2015 comments.

By letter dated February 17, 2016, a recreation therapy supervisor from the employing establishment, responded that he had been aware of appellant's illness related to her work environment at the employing establishment and off-station worksites. He had personally witnessed her reaction and illness on several occasions and considered her statements to be accurate.

OWCP received a follow-up visit report dated February 15, 2016 by Dr. Utell reiterated a history of appellant's previously accepted December 14, 2014 employment injury and current claimed work injury. Dr. Utell noted that she also had a respiratory episode in the past few months when she visited Walmart. Appellant was not entirely clear what exposure precipitated her symptoms, but she left the store and recovered fairly quickly. Dr. Utell indicated that she remained otherwise entirely asymptomatic and that she was not aware of any other agents that provoked her symptoms. He reported findings on physical examination and advised that his diagnoses of work-related respiratory symptoms most consistent with irritant-induced airway hyperreactivity and upper respiratory symptoms secondary to exposure to irritants were unchanged. Dr. Utell again opined that appellant had developed a syndrome best described as airway hyperreactivity induced by chemical inhalation.

OWCP, by decision dated March 22, 2016, denied appellant's occupational disease claim. It accepted her employment duties, but denied her claim because the medical evidence submitted was insufficient to establish a diagnosed medical condition in connection with the accepted factors of her federal employment. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On January 17, 2017 appellant, through counsel, requested reconsideration. Counsel noted that since leaving the employing establishment appellant had remained essentially asymptomatic and had no limitations with her activities.

By decision dated March 9, 2017, OWCP denied modification of its March 22, 2016 decision, again finding that the medical evidence submitted was insufficient to establish a diagnosed medical condition causally related to the accepted employment factors.

On March 14, 2017 appellant, through counsel, requested reconsideration of the March 22, 2016 and March 9, 2017 decisions. Counsel submitted a complete copy of the November 10, 2016 letter, in which Dr. Utell again related a history of her December 14, 2014 employment injury and current claimed employment injury. In addition, Dr. Utell again diagnosed work-related respiratory symptoms most consistent with irritant-induced airway hyperreactivity and upper respiratory symptoms secondary to exposure to irritants. He essentially reiterated the findings set forth in his prior reports and restated his opinion that appellant had developed a syndrome best described as airway hyperreactivity induced by chemical inhalation. Dr. Utell noted that he reviewed six SDS reports related to the floor cleaning agents of concern provided by appellant. He related that a major chemical, monoethanolamine, had been associated with respiratory irritants linked to the cause of asthma in the workplace. Dr. Utell advised that it was virtually impossible to determine the specific chemical agent that caused appellant's symptoms due to the type of clinical situations with intolerance to an indoor environment. He concluded that the described workplace exposure was the proximate cause of her respiratory complex. Dr. Utell did not believe that appellant should continue to work in the employing establishment's buildings where she developed this sensitivity. He advised that her respiratory disease was a permanent condition.

OWCP, in a decision dated May 25, 2017, denied modification of its prior decisions, finding that appellant had not submitted medical evidence, which contained a valid diagnosis in connection with the accepted factors of her federal employment. In reaching this decision, it noted that it had reviewed evidence from both OWCP File Nos. xxxxxx804 and xxxxxx227.

Appellant, through counsel, appealed to the Board on November 2, 2017. In an order dated May 2, 2018, the Board set aside OWCP's May 25, 2017 decision and remanded the case for OWCP to combine the present case record with the evidence from OWCP File No. xxxxxx227.[6] The Board noted that the evidence from OWCP File No. xxxxxx227, upon which OWCP based its denial of her occupational disease claim, was not contained in the record on appeal. The Board found that, for a full and fair adjudication in accordance with OWCP procedures, the case records needed to be combined. The Board directed that, after this combining of case files, OWCP should issue a *de novo* merit decision on whether appellant sustained a new work injury or a recurrence of disability due to her previously accepted employment injury.

On June 14, 2018 OWCP combined the case records with OWCP File No. xxxxxx227 serving as the master file.

OWCP, in a development letter dated July 20, 2018, advised appellant that it appeared that she was claiming a recurrence of disability causally related to her accepted December 14, 2014 employment injury. It requested that she submit additional factual and medical evidence in support of her claim. OWCP provided a questionnaire for appellant's completion and requested that she submit a narrative statement from her attending physician. It afforded her 30 days to respond.

[6] *Supra* note 3.

Counsel, in a letter dated August 15, 2018, noted that both appellant and the employing establishment had previously responded to the questions in its July 20, 2018 development letter. He related that she had detailed the circumstances surrounding her work-related exposure that was the subject of her occupational disease claim for a July 2, 2015 employment injury and the employing establishment had not controverted the claim. Counsel further noted that the March 22, 2016 OWCP decision found that factors of appellant's federal employment had been established. As an update, he related that she had no hobbies or other activities resulting in any similar exposures and no other injuries or medical conditions. Counsel maintained that detailed medical evidence, specifically Dr. Utell's November 10, 2016 report, had been previously submitted which established appellant's employment-related injuries and conditions.

By decision dated September 24, 2018, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record did not contain a valid medical diagnosis in connection with the accepted factors of her federal employment. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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,[7] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[8] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[9]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit 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;[10] (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[11] and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which

[7] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[8] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[9] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[10] *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[11] *Michael R. Shaffer*, 55 ECAB 386 (2004).

compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[12]

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.[13]

ANALYSIS

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

In support of her claim, appellant submitted several reports from her physician, Dr. Utell, who discussed her accepted work-related exposure to cleaning agents and found work-related respiratory symptoms most consistent with irritant-induced airway hyperreactivity and upper respiratory symptoms secondary to exposure to irritants. Dr. Utell opined that she had developed airway hyperreactivity induced by chemical inhalation. By decision dated September 24, 2018, OWCP denied appellant's occupational disease claim finding that the medical evidence of record did not contain a valid medical diagnosis in connection with the accepted factors of her federal employment.

Airway hyperreactivity induced by chemical inhalation is the same condition accepted under OWCP File No. xxxxxx227. As the medical evidence of record establishes a diagnosed condition, the case must be remanded for consideration of the medical evidence as to causal relationship. Following such further development as deemed necessary, OWCP shall issue a *de novo* decision.[14]

CONCLUSION

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

[12] *Beverly A. Spencer*, 55 ECAB 501 (2004).

[13] *See J.R.*, Docket No. 17-1781 (issued January 16, 2018); *I.J.*, 59 ECAB 408 (2008).

[14] The Board notes that while OWCP referenced its development of appellant's November 18, 2015 recurrence claim in its September 24, 2018 decision, it has not issued a final decision on this issue. Thus, the recurrence claim remains open for adjudication by OWCP.

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2018 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 17, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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