United States Department of Labor
Employees' Compensation Appeals Board

J.V., Appellant	)	
and	)	**Docket No. 18-1077**
	)	**Issued: August 26, 2020**
DEPARTMENT OF HEALTH & HUMAN SERVICES, INDIAN HEALTH SERVICE, Polacca, AZ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On May 2, 2018 appellant filed a timely appeal from a March 21, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish exposure to influenza in the performance of duty as alleged.

FACTUAL HISTORY

On February 17, 2017 appellant, then a 56-year-old nurse specialist, filed an occupational disease claim (Form CA-2) alleging that she had contracted influenza during a court appearance

[1] 5 U.S.C. § 8101 *et seq.*

while in the performance of duty. She noted that she first became aware of her condition on March 7, 2016 and realized that it was caused or aggravated by her federal employment on December 28, 2016. Appellant stopped work on March 7, 2016 and returned to work on June 27, 2016.

With her claim, appellant submitted a February 18, 2016 subpoena which required her to appear before a grand jury on March 1, 2016. The employing establishment authorized her temporary-duty travel to Phoenix, Arizona to appear before the federal grand jury. Appellant also submitted a publication regarding influenza infections in Arizona from October 4, 2015 through October 1, 2016. It indicated that her home county of Navajo had 154 cases of influenza during the week of February 28 through March 5, 2017 and the county of Maricopa, which includes the city of Phoenix, had 456 cases of influenza.

In an undated statement, appellant noted that on March 1, 2016 she drove 320 miles in a government vehicle for a court appearance that afternoon, stopping in Flagstaff, Arizona and Anthem, Arizona along the way. She entered the courthouse along with a small crowd of young adults and children. Appellant asserted that the children were coughing and had runny noses. After she testified, she walked five blocks on crowded streets to the local office of the employing establishment, chatting with a district attorney for the duration of the walk. Appellant spoke with employees at the local office and stopped in a public bathroom before leaving. She stopped at several locations on the way to her hotel, and the next day, ate breakfast, and checked out. Appellant drove home and stopped at a public restroom along the way. On March 3 and 4, 2016 she returned to work and noticed that others were coughing. By March 5, 2016 appellant was coughing and had a runny nose, and by March 6, 2016, she was unable to get out of bed. She felt chills and had a fever, as well as heaviness on her chest with breathing. Appellant was admitted to the hospital on March 7, 2019 and discharged on March 9, 2016. She returned to part-time work in May 2016, but stopped work again on June 17, 2016 and requested a transfer to a lower altitude location due to breathing difficulties. Appellant was later hospitalized for a stroke in September 2016. She noted that she had smoked cigarettes on and off since she was a teenager and most recently smoked 5 to 10 cigarettes per day from sometime in 2015 through March 2016. Appellant asserted that she was possibly exposed to influenza when she went to Phoenix for work and that she now required supplemental oxygen.

The record contains reports regarding appellant's hospitalization from March 7 to 9, 2016 for influenza B and hypoxia. In a report dated November 12, 2016, Dr. Kent A. Diehl, Board-certified in family practice, evaluated her for chronic obstructive pulmonary disease (COPD), Type 2 diabetes, and a recent cerebral vascular accident. He recommended that appellant transfer to a job at a lower altitude and with reduced hours.[2]

[2] On November 30, 2016 Dr. Moshe Hasbani, a Board-certified neurologist, opined that appellant was totally disabled from work due to COPD, her cerebrovascular accident, uncontrolled diabetes, and need for oxygen treatment. The record contains additional medical reports addressing her current condition.

On February 10, 2017 Dr. Diehl related that appellant had been admitted to the hospital on March 7, 2016 after a three- or four-day history of an upper respiratory tract illness.[3] He noted that she had traveled to Phoenix for work around the time she had become ill and had been exposed to children and people in crowded areas at the time of her trip. Dr. Diehl advised that appellant continued to require oxygen treatment since her hospitalization. He related, "There is reasonable causation to assume that [appellant] developed her influenza B infection while at work."

In a March 13, 2017 development letter, OWCP informed appellant that the evidence currently of record was insufficient to support her claim. It advised her that she had not submitted sufficient evidence to establish that she actually experienced the employment factor(s) alleged to have caused injury. OWCP also requested that appellant submit medical evidence addressing whether the identified employment exposure resulted in a diagnosed condition. It provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit additional evidence.

In a response dated March 27, 2017, appellant described her travel to Phoenix from March 1 to 2, 2016 in response to a subpoena. She related that when she entered the courthouse she had to wait in the screening area for 10 minutes behind two adults and two small children who were coughing and touching items. Later, when appellant entered the courtroom, she was exposed to people coughing for over an hour. She noted that she may have been exposed to influenza in various environments including public restrooms, walking to and from the local office of the employing establishment in Phoenix, her hotel, and restaurants. Appellant asserted that at her local employing establishment, no one had been diagnosed with her strain of influenza in March 2016.

In a report dated March 31, 2017, Dr. Diehl related that appellant had been admitted to the hospital on March 7, 2016 for influenza B with acute hypoxic respiratory failure.[4] He noted that she had traveled to Phoenix on a work-related trip on March 1 and 2, 2016. Appellant began feeling ill on March 4, 2016 and by March 5, 2016 she had shortness of breath and heaviness in her chest. Dr. Diehl related, "It is clear that [appellant] was exposed to influenza in Phoenix on March 1 or 2, [2016], as there was a high rate of influenza in that area at the time. She then developed her symptoms within one to four days of being exposed which fits with the influenza viral cycle or replication."

By decision dated May 31, 2017, OWCP denied appellant's occupational disease claim. It found that she had not factually established that she had contracted influenza during her work-related trip to Phoenix on March 1 to 2, 2016. OWCP noted that appellant had not established that she was exposed to any specific individuals with influenza. It further found that she had not submitted any medical evidence diagnosing a condition as a result of the alleged exposure.

[3] The record contains additional medical evidence, including a January 31, 2008 report regarding appellant's right lower lobe pneumonia, possible COPD, and possible diabetes and medical evidence from 2015 through 2017 regarding her current condition.

[4] Dr. Diehl noted that appellant had not been diagnosed with COPD when evaluated subsequent to her hospitalization, but instead hypoxia or hypoxemia most likely related to her pneumonia from influenza.

On June 28, 2017 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on January 17, 2018. Appellant testified that official reports demonstrated that the number of confirmed cases of influenza in Phoenix was 169 percent greater than a typical influenza season. She further testified that, because of complications of the illness, she had an injury to her lungs. Appellant asserted that, as her health facility had no cases of influenza B in March 2016, she could only have come into contact with the infectious agent during her trip to Phoenix. The hearing representative held the record open for 30 days for the submission of additional evidence.

By letter dated February 16, 2018, appellant indicated that there was a widespread epidemic of influenza in 2016 and that one could be infected from up to 600 feet away by respiratory droplets or from touching inanimate objects. She noted that her employing establishment did not dispute that her illness occurred in travel.

By decision dated March 21, 2018, OWCP's hearing representative found that "it was stipulated that the record established" that the appellant was on approved travel status at the time of the reported exposure, however, affirmed the May 31, 2017 decision finding that appellant had not established that she was exposed to the influenza virus while in the performance of duty as alleged.

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 the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation period of FECA,[6] 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.[7] 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.[8]

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

[5] *Supra* note 1.

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

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

[8] *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).

evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[9]

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.[10] Section 10.126 of Title 20 of the Code of Federal Regulations provides that a decision shall contain findings of fact and a statement of reasons.[11] The Board has held that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.[12]

ANALYSIS

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

Appellant alleged that she contracted influenza during authorized travel for work to Phoenix on March 1 and 2, 2016. While on travel status, she described exposure to children and adults who were coughing, as well as exposure to public areas and at the Phoenix office of the employing establishment.

The Board has held that an employee on travel status or a temporary-duty assignment or special mission for his or her employer is in the performance of duty and under the protection of FECA 24 hours a day with respect to any injury that results from activities essential or incidental to the special duties.[13] OWCP has already "stipulated" that appellant was on approved travel status at the time of her reported exposure and was therefore in the performance of duty when she allegedly contracted influenza. The issue, consequently, is whether the medical evidence is sufficient to show that her diagnosed influenza was causally related to exposure while on approved travel.

Section 8124(a) of FECA[14] and section 10.126 of its implementing regulations[15] require that final decisions of OWCP contain findings of fact and a statement of reasons. A decision denying a claim should contain a correct description of the basis for the denial in order that the parties of interest have a clear understanding of the precise defect of the claim and the kind of

[9] *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

[10] 5 U.S.C. § 8124(a).

[11] 20 C.F.R. § 10.126.

[12] *J.R.*, Docket No. 19-0746 (issued June 9, 2020); *L.M.*, Docket No. 13-2017 (issued February 21, 2014); Federal (FECA) Procedure Manual Part 2 -- Claims, *Disallowances* Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

[13] *R.R.*, Docket No. 19-1026 (issued January 14, 2020); *W.Y.*, Docket No. 09-2012 (issued July 16, 2010).

[14] *Supra* note 10.

[15] *Supra* note 11.

evidence which would overcome it.[16] The Board finds that OWCP's March 21, 2018 decision was incomplete as it failed to make findings regarding whether the medical evidence of record is sufficient to establish causal relationship between the diagnosed influenza and appellant's travel. Consequently, OWCP has not fulfilled its responsibility under section 8124 of FECA and section 10.126 of its implementing regulations.[17] The case will therefore be remanded to OWCP for a proper decision, to include findings of fact and a statement of reasons, regarding whether the medical evidence is sufficient to establish causal relationship.[18] Following any further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 21, 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: August 26, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

[16] *O.M.*, Docket No. 19-0342 (issued November 15, 2019); *Patrick Michael Duffy*, 43 ECAB 280 (1991).

[17] *See L.D.*, Docket No. 19-0350 (issued October 22, 2019).

[18] *See S.C.*, Docket No. 19-1837 (issued June 9, 2020); *A.C.*, Docket No. 17-1927 (issued April 12, 2018).