

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

D.D., Appellant)	
)	
and)	Docket No. 19-1715
)	Issued: December 3, 2020
DEPARTMENT OF DEFENSE, DEFENSE)	
LOGISTICS AGENCY, Tracy, CA, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 August 12, 2019 appellant, through counsel, filed a timely appeal from a May 14, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 his burden of proof to establish exposure to Valley Fever spores in the performance of duty as alleged.

FACTUAL HISTORY

On October 17, 2018 appellant, then a 36-year-old distribution process worker, filed an occupational disease claim (Form CA-2) alleging that he developed a severe lung infection causally related to factors of his federal employment. He advised that he first became aware of his condition on November 2, 2017 and attributed it to his federal employment on November 3, 2017. Appellant attributed his lung condition to exposure to “a plethora of dust during construction due to the lack of poor engineering controls and high winds.” He further maintained that the employing establishment failed to provide employees with personal protective equipment (PPE) or adequately assessed the work area to protect employee safety. Appellant stopped work on November 2, 2017 and returned to work on January 2, 2018 in a temporary office position.

In an October 19, 2018 statement, appellant related that, in the fall of 2017, he had worked in a warehouse located across from an area where construction crews were digging into the ground and moving dirt using heavy equipment. He alleged that, during the construction, the bay doors of the warehouse were open and a significant amount dust blew into the warehouse. Management did not provide dust masks. Safety representatives advised that the bay doors should be closed if not in use and that dust masks should be provided, but few masks were available. Appellant began to feel sick a few weeks later. He was admitted to the hospital and diagnosed with coccidioidomycosis, also referred to as Valley Fever.

In a development letter dated October 17, 2018, OWCP notified appellant that the evidence submitted was insufficient to support his claim as there was no medical evidence containing a diagnosed condition due to his employment. It advised him of the type of factual and medical evidence needed, including a report from his attending physician explaining the causal relationship between those exposures and the claimed conditions. By separate letter of even date, OWCP also requested additional information from the employing establishment regarding the presence of harmful substances, including a statement from a knowledgeable supervisor on the accuracy of the employee’s allegations. It afforded both parties 30 days to respond.

Thereafter, OWCP received an April 3, 2018 letter from the employing establishment to the Department of Labor’s Occupational Safety and Health Administration (OSHA). It advised that an internal investigation had failed to substantiate allegations that multiple employees had become sick with Valley Fever since October 2017 from exposure to dust from soil and construction. The employing establishment indicated that its location within the state had reported cases of Valley Fever and that the organism traveled on the wind and was inhaled. It maintained that employees could voluntarily wear PPE and there was no reliable test to see if it was in the soil.

In an internal employing establishment email dated September 11, 2018, S.E. advised D.B. that OSHA had investigated an employee’s complaint of Valley Fever. She forwarded an email that advised that there were no construction projects that had disrupted soil for six months prior to October 2017. From January 2016 to March 2017 there were six projects that disrupted the soil,

but the employing establishment used dust control methods. The email listed the applicable construction projects, including replacing a building elevator from August 2016 to December 22, 2017 that required excavating 48 square feet.

On November 8, 2018 the employing establishment asserted that appellant had not factually established his claim. It advised that there were no construction projects that had disturbed soil for six months prior to October 2017. The employing establishment, thus, maintained that appellant had not been exposed to dust due to construction. It also challenged his allegations that he was not provided with PPE.

By decision dated November 28, 2018, OWCP denied appellant's occupational disease claim. It found that he had not factually established exposure to Valley Fever from dust due to construction during the fall of 2017 or that he was not provided with PPE.

On December 27, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearing and Review.

Thereafter, OWCP received a July 13, 2018 letter from OSHA, which informed the employing establishment that four cases of Valley Fever had been diagnosed in its employees in the last year and eight cases had been diagnosed since 1993. It asserted that the rate of Valley Fever in the general population was 25.3 cases by 100,000 people, but that the equivalent rate at the employing establishment was 571.00 per 100,000 people. OSHA recommended actions for the employing establishment to take to prevent Valley Fever, including making workers aware of the risk, providing training, minimizing soil disruption, implementing control methods to reduce airborne dust exposure, cleaning equipment, and providing a room for workers to change clothing. It noted that the coccidioides fungus was "prevalent in the area" around the employing establishment.

In a September 18, 2018 report, Dr. Dang Nguyen, an osteopath, advised that he was treating appellant for pulmonary coccidioidomycosis. He found that appellant should avoid dusty and windy areas.

In a witness statement dated March 16, 2019, K.M., a coworker, related that employees were told not to park cars in a particular area because of the dirt.³ She asserted that the bay doors were open because of the need to send and receive material and dirt blew directly into the building. There was also construction inside the building that blew dust around. Appellant looked sick and K.M. suggested that he go to a physician.

Appellant submitted a list of engineering projects by the employing establishment. It included elevator replacement at Building 16B from July 5, 2017 to October 12, 2018.

A telephonic hearing was held on March 18, 2019. Appellant related that there was construction at an empty lot across the street from his warehouse near the daycare center. He advised that the dirt was being moved in preparation for paving the area, and that employees were told not to park their vehicles in the vicinity because of the dirt. Appellant related that copious

³ The introductory portion of K.M.'s statement is not legible.

amounts of dirt came into the warehouse during that time and that they were unable to close the doors of the warehouse because of receiving freight. He tried to get dust masks, but only a few were available.

In an April 15, 2019 email, Dr. Corwin John Hull, who works for the employing establishment and is Board-certified in occupational medicine, advised that at the hearing appellant had referenced a paving project across from a daycare center and diagonal to Warehouse 30. He indicated that the paving project was completed June 17, 2019. Dr. Hull asserted that the incubation period after exposure to coccidioides spores was 7 to 28 days and, thus, the employee's exposure had occurred in October 2017. He maintained that the employing establishment took safety measures to reduce exposure to soil and dust and that an air quality study of Warehouse 30 in September 2017 found particulars within OSHA's permissible exposure limit. Dr. Hull asserted that the incident rate at the employing establishment for Valley Fever was not higher than in the general population if the timeline was from 1993 onward.

In an April 17, 2019 statement, the employing establishment again challenged that appellant had established exposure to Valley Fever spores from construction that had occurred in the fall of 2017. It noted that Dr. Hull related that the construction project appellant had identified as causing his condition was completed in June 2017 and, thus, could not have caused his illness in November 2017. The employing establishment indicated that Valley Fever was endemic to the area.

By decision dated May 14, 2019, OWCP's hearing representative affirmed the November 28, 2018 decision. He found that appellant had not factually established the occurrence of the employment exposure alleged to have caused his condition.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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,⁵ 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 upon a traumatic injury or an occupational disease.⁷

⁴ *Supra* note 2.

⁵ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *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).

In an occupational disease claim, appellant's burden of proof 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

ANALYSIS

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

Appellant alleged that he contracted Valley Fever due to exposure to dust from construction while working at the employing establishment. He maintained that he worked in a warehouse located across from an area where constructions crews had dug into the ground and moved dirt with heavy machinery. Appellant asserted that dust blew in through the open bay doors of the warehouse. In a witness statement dated March 16, 2019, K.M., a coworker, indicated that there was construction across from their building and that the bay doors of the warehouse were consistently open so that material could be shipped and received. She indicated that the wind blew dirt into the building. Appellant looked unwell and K.M. advised that he should see a physician.

On July 13, 2018 OSHA confirmed that eight employees at the employing establishment facility had been diagnosed with Valley Fever since 1993, with four of these diagnoses occurring in the last year. It advised that the case rate for Valley Fever for the general population of the area was 25.3 cases per 100,000, but at the employing establishment the equivalent case rate in 2018 was magnitudes higher at 571 per 100,000 workers. OSHA indicated that the coccidioides fungus that caused Valley Fever was prevalent in the area surrounding the employing establishment.

The employing establishment's April 15, 2019 email from Dr. Hull confirmed that there was a storage area project where a large dirt lot located diagonally opposite warehouse 30 was prepared for paving with heavy equipment and then paved in June 2017. He opined that because the construction was completed by June 2017 appellant's Valley Fever condition could not be attributed to that exposure due to the incubation period. However, in an April 3, 2018 letter, the employing establishment explained that there were no commercially available tests to detect liberated fungal spores in the soil. It noted that the organism traveled by wind and was inhaled.

As the record contains sufficient evidence to establish that appellant was exposed to Valley Fever spores while in the performance of duty, the Board finds that he has established that the occupational exposure occurred as alleged.⁹ Consequently, consideration of the medical evidence is necessary.¹⁰ The case will therefore be remanded to OWCP for evaluation of the medical evidence to determine whether there is a causal relationship between the claimed Valley Fever and

⁸ *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

⁹ *See M.B.*, Docket No. 19-1643 (issued July 20, 2020); *L.G.*, Docket No. 19-0201 (issued June 26, 2019).

¹⁰ *See D.S.*, Docket No. 19-0203 (issued June 3, 2019); *M.D.*, Docket No. 18-1365 (issued March 12, 2019).

the accepted factors of appellant's federal employment.¹¹ Following this and other such 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 May 14, 2019 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: December 3, 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

¹¹ See *K.B.*, Docket No. 18-1548 (issued March 11, 2019).