United States Department of Labor
Employees' Compensation Appeals Board

K.T., Appellant	)	
and	)	**Docket No. 19-1436**
	)	**Issued: February 21, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Gaithersburg, MD, Employer	)	

Appearances:
Sara Kincaid, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 17, 2019 appellant, through counsel, filed a timely appeal from a January 24, 2019 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 respiratory condition causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

On April 22, 2016 appellant, then a 52-year-old disability compliance specialist, filed an occupational disease claim (Form CA-2) alleging that she developed asthma due to exposure to harmful substances in the workplace. She advised that she first became aware of her claimed condition and its relation to factors of her federal employment on March 23, 2016. Appellant stopped work on March 24, 2016.

In an accompanying statement, appellant described instances in the summer of 2015 and March 2016 when she had coughing spells while working at the employing establishment worksite in Gaithersburg, Maryland. She also described a coughing spell she experienced in the summer of 2015 while working at the worksite in L'Enfant Plaza, Washington, District of Columbia, and in December 2015 while working at the worksite in Waldorf, Maryland. Appellant asserted that she was exposed to harmful allergens in the air at these locations.

Appellant subsequently submitted an April 20, 2016 report from Dr. Victor E. Herry, a Board-certified internist and pulmonologist, who reported that appellant presented to his office on October 19, 2015 after visiting the emergency room as a result of facial swelling. She subsequently underwent skin testing and was found to be allergic to aeroallergens, including dust, molds, dander, weeds, grasses, trees, and pollen. Dr. Herry indicated that appellant also presented to his office on March 31, 2016 with excessive coughing and accompanying hoarseness which she reported had begun at work. He reported that, after being away from the workplace, appellant's coughing stopped and her lungs became completely clear without wheezing. Dr. Herry opined that appellant's work environment contained some aeroallergens which resulted in her having hyperirritable airways and experiencing excessive coughing and wheezing.

In a May 9, 2016 attending physician's report (Form CA-20), Dr. Herry listed the date of injury as March 23, 2016 and the diagnosis due to the employment activity as mild persistent asthma with status asthmaticus. He checked a box marked "Yes" to indicate that the diagnosed condition was caused or aggravated by the employment activity and added the notation, "Environmental agents at work can aggravate the patient's asthma symptoms such as coughing and [shortness of breath]."

In a May 19, 2016 development letter, OWCP requested that appellant submit additional factual and medical evidence, including a physician's opinion supported by a medical explanation as to how the reported employment factors caused or aggravated a medical condition. It provided a questionnaire for her completion which posed a series of questions regarding the reported employment factors. OWCP afforded appellant 30 days to respond.[3]

[3] On May 19, 2016 OWCP also requested additional information from the employing establishment which was to be submitted within 30 days.

In response, appellant provided a June 3, 2016 statement in which she provided additional details regarding the incidents at work she previously identified. She advised that she only suffered asthma attacks at work and noted that her coughing episodes were accompanied by wheezing. The employing establishment submitted an undated letter from the manager of its disability programs answering a series of questions posed by OWCP. The manager indicated that May 9, 2013 testing at the L'Enfant Plaza worksite revealed airborne fungal/mold populations that were consistent with those found outdoors.[4]

Appellant submitted a June 20, 2016 report from Dr. Herry who noted that appellant was first seen on October 19, 2015 after a visit to the emergency room for angioedema and that she first reported having experienced wheezing when she was seen on March 31, 2016. She complained of excessive coughing in the workplace and advised that she developed hoarseness as a result. Dr. Herry indicated that appellant reported that whenever she was at work she experienced violent coughing with no control, but that she had no symptoms away from work. He advised that asthma was a clinical syndrome characterized by episodic reversible airway obstruction, increased bronchial reactivity, and airway inflammation. Dr. Herry noted that environmental exposure in sensitized individuals was a major inducer of airway inflammation.[5] In a July 15, 2016 report, he recommended that various measures be taken at appellant's worksites, including the cleaning of all air ducts.

Appellant also submitted a copy of a report detailing August 29, 2016 testing which was conducted at the Gaithersburg, Maryland worksite by a private company. It indicated that the indoor air quality comfort parameters of the tested area (including temperature, relative humidity, and carbon dioxide) were within acceptable comfort parameters which were below exposure limits and below levels that might facilitate mold growth. The total volatile organic compound (VOC) levels were found to be at the low range of the "multifactoral exposure range" which might cause irritation if other stressors or exposure irritation are expected.[6] The study provided that the VOC levels did not represent a "negative impact" to the indoor air quality and advised that there was no discernable difference in the measured and observed parameters between the complaint and control areas. The laboratory analytical results indicated that the airborne fungal spore populations identified in the assessed areas were less than the exterior control samples, were consistent with populations of fungi that were common outdoors, and did not pose a risk to most occupants with respect to the presence of unusual fungal populations or fungal species of concern. The report noted, however, that different individuals might have differing sensitivities to mold and other allergens.

By decision dated October 21, 2016, OWCP accepted that appellant was exposed to low levels of dust and mold in her workplace. However, it denied her claim, finding that she had not submitted medical evidence sufficient to establish a medical condition casually related to the

[4] The employing establishment attached a report detailing the May 9, 2013 testing which was conducted at the L'Enfant Plaza worksite by a private company.

[5] Appellant also submitted a June 29, 2016 report from Dr. Bahram Redjaee, a Board-certified internist and pulmonologist, who diagnosed "severe allergy resulting in unknown."

[6] The report indicated that the mold samples collected also included dust particles.

accepted employment factors. OWCP concluded, therefore, that appellant had not met the requirements to establish "an injury and/or medical condition causally related to the accepted work event(s)."

On July 26, 2017 appellant, through counsel, requested reconsideration of the October 21, 2016 decision. Counsel argued that the reports of Dr. Herry established appellant's claim.[7]

Appellant submitted a June 16, 2017 report from Dr. Herry who diagnosed unspecified asthma (uncomplicated) and other asthma. Dr. Herry advised that appellant's wheezing was triggered by her work environment and opined that, based on his examination and review of the medical history, appellant's exposure to dust, molds, and other aeroallergens (as documented in the August 29, 2016 study) contributed to her development of occupational asthma. He indicated that, although the August 29, 2016 air quality study concluded that the overall air quality had not been negatively impacted, it should be noted that different individuals might have differing sensitivities to mold spores and other aeroallergens and might have a reaction to aeroallergens at low levels that are deemed safe to most. Prior skin testing had shown that appellant was allergic to many aeroallergens, including dust and molds, making her particularly sensitive to exposure to these aeroallergens.

Dr. Herry further indicated that exposure to aeroallergens in a sensitized individual such as appellant, even in small quantities, could cause the airways to become inflamed and narrowed, thereby leading to increased bronchial reactivity that caused coughing and wheezing. He posited that this increased bronchial activity was what caused asthma and this process happened to appellant as a result of continued exposure to mold, dust, and other aeroallergens in her work environment. He opined that this mechanism of injury was consistent with appellant's development of occupational asthma and her immediate onset of respiratory symptoms after exposure to her work environment, which improved while away from work, and was also consistent with continued exposure to mold, dust, and other aeroallergens in her work environment, thereby contributing to her development of occupational asthma. Dr. Herry concluded, "Therefore, based on my objective findings and within reasonable medical certainty, it is my medical opinion that the patient's continued exposure to mold, dust, and other aeroallergens in her work environment since March 23, 2016 has contributed to her development of occupational asthma."

The employing establishment submitted January 17 and August 17, 2017 letters in which agency officials argued that the results of the 2016 air quality study diminished the validity of appellant's claim for an employment-related respiratory condition.

By decision dated October 24, 2017, OWCP denied modification of the October 21, 2016 decision.

On October 23, 2018 appellant, through counsel, requested reconsideration of the October 24, 2017 decision. In a September 12, 2018 report, Dr. Herry provided a discussion of

[7] On January 17, 2017 appellant filed a notice of recurrence (Form CA-2a). However, her filing of this form was premature as her claim had not yet been accepted.

the cause of appellant's occupational asthma which was essentially the same as that contained in his previously submitted June 16, 2017 report.

By decision dated January 24, 2019, OWCP denied modification of the October 24, 2017 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[8] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, 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, 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.[9] These are the essential elements of every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[10]

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; (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 identified employment factors.[11]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[12] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.[13] Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).[14]

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[8] *Supra* note 2.

[9] *K.V.*, Docket No. 18-0947 (issued March 4, 2019); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

[10] *K.V. and M.E., id.*; *Elaine Pendleton,* 40 ECAB 1143 (1989).

[11] *R.G.*, Docket No. 19-0233 (issued July 16, 2019). *See also Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[12] *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

[13] *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

[14] *Id.*; *Victor J. Woodhams*, *supra* note 11.

ANALYSIS

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

Appellant submitted a series of reports from Dr. Herry who found that appellant sustained a respiratory condition due to exposure to harmful substances in the workplace. Dr. Herry provided his most extensive discussions positing that appellant sustained employment-related asthma in narrative reports dated June 16, 2017 and September 12, 2018. In these reports, he explained that although the August 29, 2016 air quality study concluded that the overall air quality had not been negatively impacted, it should be noted that different individuals might have differing sensitivities to mold spores and other aeroallergens and might have a reaction to aeroallergens at low levels that are deemed safe to most. Prior skin testing had shown that appellant was allergic to many aeroallergens, including dust and molds, making her particularly sensitive to exposure to these aeroallergens. This mechanism of injury was consistent with appellant's development of occupational asthma and her immediate onset of respiratory symptoms after exposure to her work environment, which improved while away from work, and was also consistent with continued exposure to mold, dust, and other aeroallergens in her work environment, thereby contributing to her development of occupational asthma. Dr. Herry concluded that appellant's continued exposure to mold, dust, and other aeroallergens in her work environment since March 23, 2016 contributed to her development of occupational asthma. The Board further notes that Dr. Herry also found, in reports dated April 20 and May 9, 2016, that appellant's respiratory condition was related to exposure to allergens in the workplace.

The Board notes that proceedings under FECA are not adversarial in nature, and OWCP is not a disinterested arbiter.[15] The Board finds that while Dr. Herry's reports are insufficient to meet appellant's burden of proof, they raise an uncontroverted inference of causal relation between her claimed respiratory condition and the accepted factors of her federal employment. Further development of appellant's claim is therefore required.[16]

On remand OWCP shall prepare a statement of accepted facts and refer appellant to an appropriate Board-certified specialist for a second opinion examination and an evaluation regarding whether she sustained a medical condition due to the accepted factors of her federal employment. Following any necessary further development, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[15] *See B.B.*, Docket No. 18-1321 (issued April 5, 2019).

[16] *See C.M.*, Docket No. 17-1977 (issued January 29, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further action consistent with this decision of the Board.

Issued: February 21, 2020
Washington, DC

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

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

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