

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

D.O., Appellant)	
)	
and)	Docket No. 19-1437
)	Issued: January 2, 2020
DEPARTMENT OF THE ARMY, U.S. ARMY)	
PINE BLUFF ARSENAL, Pine Bluff, AR,)	
Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 June 24, 2019 appellant, through counsel, filed a timely appeal from a May 22, 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 her burden of proof to establish a pulmonary condition causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

On June 27, 2018 appellant, then a 51-year-old industrial worker, filed an occupational disease claim (Form CA-2) alleging that she developed idiopathic pulmonary fibrosis in both lungs due to factors of her federal employment. She indicated that she first became aware of her condition on December 20, 2016 and first realized it was caused or aggravated by factors of her federal employment on January 5, 2017. Appellant stopped work on April 26, 2018.

In a narrative statement accompanying her claim, appellant related that she had worked for the employing establishment for over 10 years, since March 10, 2008, and in approximately June 2016 she started experiencing shortness of breath, severe body aches, and joint pain, along with pain in her upper left abdomen and stomach. She went to a doctor who found a spot on her left lung. Appellant explained that on her first day back to work after having a lung biopsy, on November 30, 2016 her supervisor sent her back to work on the M-295 line and, after being in there for about 30 minutes, she began having trouble breathing and became nauseated and light-headed. She was also having joint pain and her stomach was hurting. Appellant stated that these were the same symptoms she was experiencing before she had her biopsy. Her supervisor then moved her to work in "ICEMP," which was dusty, dirty, and where pallets and tri-walls were covered in bird droppings, animal feces, and bees.

In support of her claim, appellant submitted a position description indicating that she worked both inside and outside, occasionally in areas that were drafty, and the nature of her work was dirty, dusty, greasy, and the area could be noisy.

An operative report dated November 30, 2016 from Dr. Lee A. Forestiere, a Board-certified general surgeon, indicated that appellant had been diagnosed with bilateral lower lobe interstitial infiltrates with honeycombing. He noted that the findings were consistent with pulmonary fibrosis/progressive shortness of breath on exertion. Dr. Forestiere indicated that she had undergone a left thoracoscopy with wedge biopsies of the left lower lobe and lingular segment of the left upper lobe.

In medical records dated September 14 and 19, October 20, and November 17, 2016 and January 19 and November 12, 2017, Joe Steele, a certified physician assistant, diagnosed pulmonary (lung) disease and abdominal pain and recommended that appellant work in an area free of dust or other airborne particulates.

In a report dated December 20, 2016, Dr. Ali Al-Nashif, a Board-certified internist, diagnosed pulmonary fibrosis/usual interstitial pneumonia, shortness of breath, bilateral clubbing, tobacco use, gastroesophageal reflux disease (GERD), obstructive sleep apnea, and anxiety. He reported that appellant underwent a video-assisted thoracic surgery (VATS) with open lung biopsy on the left lung on December 7, 2016 and still had some occasional shortness of breath with exertion, none at rest, but that her condition had improved. On January 11, 2017 Dr. Al-Nashif

indicated that appellant went back to work and reported that her work environment had a lot of dust and chemicals and that she was very short of breath.

On June 20, 2017 Dr. Arthur C. Okwesili, a Board-certified occupational medicine specialist, indicated that appellant had a medical condition that worsened when she wore a respirator, worked in a dusty environment, or was in a hot/excessively humid environment. He found that appellant could not wear a respirator and had a medical condition that made it difficult to breathe while wearing a respirator. Dr. Okwesili advised that per her pulmonologist, appellant could not work in a dusty environment.

In a development letter dated July 20, 2018, OWCP advised appellant of the factual and medical evidence necessary to establish her claim. It attached a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In response, appellant submitted a safety data sheet confirming her exposure to sorbent powder in the workplace. She also submitted a narrative statement in response to OWCP's questionnaire, wherein she again outlined her alleged exposures to substances she believed contributed to her pulmonary conditions. Appellant also confirmed that she smoked half a pack of cigarettes per day for approximately 20 years.

In progress reports dated November 7, 2017 and July 11, 2018, Dr. Al-Nashif diagnosed idiopathic pulmonary fibrosis and moderate chronic obstructive pulmonary disease (COPD). He also reported that appellant had a productive cough for several months and wheezed. Dr. Al-Nashif indicated that she had no emergency room visits or hospitalizations and continued to smoke half a pack of cigarettes daily.

In an undated statement, appellant's supervisor indicated that she started complaining that she felt light-headed and dizzy on September 13, 2016. She thereafter summarized appellant's daily work activities. Appellant's supervisor denied that appellant had to work with items that were covered with mold, mildew, or animal feces.

By decision dated October 5, 2018, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish the implicated employment factors. It concluded, therefore, that appellant had not met the requirements to establish that she sustained an injury as defined by FECA.

On October 22, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on March 14, 2019. Appellant provided testimony and the hearing representative held the case record open for 30 days to submit additional evidence.

Appellant subsequently submitted three witness statements from coworkers who testified that there was dust, mildew, mold, animal feces, animal urine, water, sludge, and sometimes dried up blood in their workplace.

By decision dated May 22, 2019, OWCP's hearing representative denied the claim, as modified, finding that the factual evidence of record was sufficient to establish that appellant was exposed to sorbent powder, dust, mildew, mold, animal feces, and animal urine at work. However,

the hearing representative further found that the medical evidence of record was insufficient to establish a causal relationship between appellant's diagnosed pulmonary condition(s) and the accepted factors of her federal employment.

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,³ 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.⁴ 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.⁵

To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee 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 employment factors identified by the employee.⁶

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁷ 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.⁸ 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).⁹

³ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *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).

⁶ *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).

⁷ *H.A.*, Docket No. 18-1466 (issued August 23, 2019); *T.H.*, 59 ECAB 388, 393 (2008).

⁸ *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

⁹ *Id.*; *Victor J. Woodhams*, *supra* note 6.

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a pulmonary condition causally related to the accepted factors of her federal employment.

A November 30, 2016 operative note from Dr. Forestiere indicated that appellant had been diagnosed with bilateral lower lobe interstitial infiltrates with honeycombing, consistent with pulmonary fibrosis, and that a left lobe thoracoscopy had been performed. Dr. Forestiere, however, offered no opinion regarding causal relationship. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹⁰ This report is therefore insufficient to establish appellant's claim.

A series of reports from Dr. Al-Nashif provided diagnoses, but also failed to provide an opinion on causal relationship. As explained above, these reports are of no probative value as they do not contain an opinion on causal relationship.¹¹

Dr. Okwesili reported on June 20, 2017 that appellant had a medical condition that worsened when she wore a respirator and worked in a dusty, hot, or excessively humid environment. However, he merely repeated the history of injury as reported by appellant, without providing his own opinion regarding whether appellant's condition was work related. The mere recitation of patient's history does not suffice for purposes of establishing causal relationship.¹² Dr. Okwesili's report is, therefore, insufficient to establish appellant's claim.

The September 14, 2016 to November 12, 2017 reports from Mr. Steele, a certified physician assistant, are also insufficient to establish appellant's claim because physician assistants are not considered "physicians" as defined under FECA. Therefore, his opinion does not constitute competent medical evidence.¹³

As appellant has not submitted rationalized medical evidence to support her claim that she sustained a pulmonary condition causally related to the accepted factors of her federal employment, the Board finds that she has not met her burden of proof to establish a claim.

¹⁰ *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018) (medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship).

¹¹ *Id.*

¹² *J.G.*, Docket No. 19-1116 (issued November 25, 2019); *see J.G.*, Docket No. 17-1382 (issued October 18, 2017).

¹³ *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law). *E.T.*, Docket No. 17-0265 (issued May 25, 2018) (physician assistants are not considered physicians under FECA).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 (a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a pulmonary condition causally related to the accepted factors of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 2, 2020
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