

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

W.M., Appellant)
and) Docket No. 19-1512
DEPARTMENT OF THE ARMY, BLUEGRASS) Issued: January 7, 2020
ARMY DEPOT, Richmond, KY, 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

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 8, 2019 appellant filed a timely appeal from a May 28, 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.³

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.*

³ The Board notes that, following the May 28, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a medical condition causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On August 29, 2018 appellant, then a 62-year-old toxic materials handler, filed an occupational disease claim (Form CA-2) alleging that he sustained a throat injury, with accompanying chronic cough, airway obstruction, and voice hoarseness, due to factors of his federal employment, including exposure to harmful chemical agents. He indicated that he first became aware of his claimed injury and first realized its relation to factors of his federal employment on October 30, 2017. Appellant did not stop work.

In a September 5, 2018 development letter, OWCP requested that appellant submit additional evidence in support of his claim, including a physician's opinion supported by a medical explanation as to how the claimed factors of his federal employment caused or aggravated a medical condition. It provided a questionnaire for his completion, which posed a series of questions regarding the claimed factors of federal employment. OWCP afforded appellant 30 days to respond. On September 5, 2018 it also requested additional information from the employing establishment. It was also afforded 30 days to respond.

In response, appellant submitted a September 19, 2018 statement in which he indicated that, in late 2017, he handled bags containing munitions which had leaked mustard gas. He reported that on one occasion he was directly exposed to mustard gas from leaking munitions for approximately 10 minutes. Appellant described his symptoms, including nausea, coughing, and vomiting, which he experienced beginning six to eight hours after this exposure.

Appellant also submitted a December 15, 2017 surgery report from Dr. Alan Graham, a Board-certified general surgeon, who indicated that he performed an esophagogastroduodenoscopy with biopsy of the esophagus on that date. Dr. Graham diagnosed hiatal hernia (one centimeter) with distal esophagitis and mild gastritis.⁴ The findings of a December 21, 2017 computerized tomography (CT) scan of appellant's chest contained an impression of right upper lobe nodule (six millimeters) as well as ground glass opacity in the posterior left lower lobe, with the notation, "This may be inflammatory, but neoplasm is not excluded."

In an August 30, 2018 report, Dr. Gregory Osetinsky, a Board-certified otolaryngologist, indicated that he had evaluated appellant for throat hoarseness and noted that a spirometry test came back with normal results. He diagnosed chronic cough, deviated nasal septum, allergic rhinitis, and laryngopharyngeal reflux, and he indicated that no pathology was present which would cause limitations.

In an undated statement, received on October 10, 2018, the field operations division chief for the employing establishment indicated that during a 13-week period in 2017 appellant's position required him to handle hazardous waste. He noted that it was known that some bags that

⁴ An unsigned December 15, 2017 report shows negative biopsy results for helicobacter pylori infection.

appellant handled contained leaking munitions that set off an alarm, indicating the presence of mustard gas contamination. The exposure occurred during a preparatory handling stage when appellant was not wearing full protective gear. The employing establishment submitted a position description of the toxic materials handler job held by appellant.

By decision dated October 18, 2018, OWCP accepted that appellant had established employment factors in the form of exposure to mustard gas leaking from munitions. However, it denied his claim finding that he had not met the requirements to establish that he sustained “an injury and/or medical condition causally related to the accepted work event(s).”

On November 5, 2018 appellant, through counsel, requested a telephonic hearing with a representative of OWCP’s Branch of Hearings and Review. During the hearing, held on March 11, 2019, appellant provided further details regarding his exposure to mustard gas in the workplace.

Appellant submitted November 2, 2017 reports from Dr. Fernando E. Ordaz, a Board-certified internist, who indicated that appellant, who had long-standing psoriatic arthritis, presented expressing a concern about potential exposure to mustard gas at work on October 30, 2017.⁵ Appellant advised that he had long-standing itching and scratching at the upper back, nape of the neck, top of the buttocks, and left anterior thigh, and he reported that he began experiencing nausea and loss of appetite on November 1, 2017. Dr. Ordaz indicated that his physical examination revealed finger deviation of the right hand consistent with arthritis, but that there were no new rashes or vesicles. He advised that appellant had not exhibited symptoms consistent with mustard gas exposure, such as eye/lacrimal symptoms, mouth/perioral lesions, hand or forearm symptoms, new lesions on the feet or shins, new rashes upon head-to-toe skin assessment, or respiratory distress. Dr. Ordaz noted that, from a clinical standpoint, appellant had nausea and perhaps gastroenteritis. He indicated, “Overall clinical presentation may be more consistent with a transient viral gastric illness than mustard gas exposure.”

In a November 8, 2017 addendum to his November 2, 2017 reports, Dr. Ordaz indicated that he had reviewed appellant’s laboratory results and advised appellant that he could find no clear evidence of mustard gas exposure. He explained that these results “all came back inconsistent with mustard toxicity.”

By decision dated May 28, 2019, the hearing representative affirmed OWCP’s October 18, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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

⁵ Dr. Ordaz noted that appellant reported that an exposure occurred when he opened and placed his hand in a bag containing artillery shells, which leaked mustard gas, when he was either inside a work shed or in the open air outside of the work shed.

⁶ *Supra* note 2.

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.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

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.⁹

Causal relationship is a medical question that requires rationalized medical evidence to resolve the issue.¹⁰ A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.¹¹ 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).¹²

ANALYSIS

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

Appellant submitted November 2, 2017 reports from Dr. Ordaz who indicated that, upon physical examination, appellant had not exhibited symptoms consistent with mustard gas exposure. Dr. Ordaz noted, from a clinical standpoint, that appellant had nausea and perhaps gastroenteritis and indicated, "Overall clinical presentation may be more consistent with a transient viral gastric illness than mustard gas exposure." In a November 8, 2017 addendum to his November 2, 2017 reports, he noted that appellant's laboratory results "all came back inconsistent with mustard toxicity" and that he could find no clear evidence of a medical condition related to mustard gas exposure.

⁷ *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).

⁸ *K.V. and M.E., id.; Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ *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).

¹⁰ *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

¹¹ *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

¹² *Id.; Victor J. Woodhams*, *supra* note 9.

The Board finds that these reports are of no probative value with respect to appellant's occupational injury claim because they provide no indication that the established employment factors, *i.e.*, exposure to mustard gas leaking from munitions, contributed to the diagnosed conditions. In fact, Dr. Ordaz advised that no evidence was found that appellant had a condition related to mustard gas exposure. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.¹³ Therefore, these reports are insufficient to establish appellant's claim.¹⁴

Appellant also submitted a December 15, 2017 surgery report for an esophagogastro-duodenoscopy with biopsy of the esophagus, which contained diagnoses of hiatal hernia with distal esophagitis and mild gastritis. A December 21, 2017 report of a CT scan of the chest contained an impression of right upper lobe nodule and ground glass opacity in the posterior left lower lobe. In an August 30, 2018 report, Dr. Osetinsky diagnosed chronic cough, deviated nasal septum, allergic rhinitis, and laryngopharyngeal reflux. However, these reports do not contain an opinion on the cause of the observed conditions and; therefore, they have no probative value regarding appellant's claim for employment-related medical conditions. As noted above, medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.¹⁵ Therefore, these reports are insufficient to establish appellant's claim.¹⁶

As the medical evidence of record does not contain a rationalized opinion establishing causal relationship between appellant's diagnosed conditions and the accepted factors of his federal employment, the Board finds that appellant has not met his burden of proof to establish his claim.

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 his burden of proof to establish a medical condition causally related to the accepted factors of his federal employment.

¹³ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁴ *Id.*

¹⁵ See *supra* note 13.

¹⁶ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 7, 2020
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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