

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

J.Q., Appellant)	
)	
and)	Docket No. 20-1477
)	Issued: March 25, 2021
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
Columbus, NM, 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 3, 2020 appellant, through counsel, filed a timely appeal from a June 30, 2020 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 an injury in the performance of duty, as alleged.

FACTUAL HISTORY

On June 28, 2019 appellant, then a 65-year-old retired assistant port director, filed an occupational disease claim (Form CA-2) alleging that he developed emphysema due to factors of his federal employment. He noted that he first became aware of his condition and realized of its relation to his federal employment on March 27, 2019. Appellant retired effective August 31, 2018. He noted that he delayed filing his claim because he was hospitalized from March 27 through May 22, 2019.

In support of his claim, appellant submitted x-ray reports of his chest, dated May 19 through 22, 2019, which revealed patchy bibasilar opacities, trace right basolateral pneumothorax, and persistent bibasilar atelectasis or infiltrate. He also submitted laboratory test results, hospital discharge notes, and a medication list dated May 22, 2019.

In a development letter dated July 19, 2019, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor and an explanation of appellant's work activities. It afforded both parties 30 days to submit the necessary evidence.

OWCP subsequently received a July 24, 2019 report from Dr. Juan Fernandez, a Board-certified pulmonologist, who noted that appellant was recovering following his hospitalization. Dr. Fernandez examined appellant and diagnosed interstitial lung disease, SS-A antibody positive, post-influenza syndrome, history of deep vein thrombosis (DVT), history of pseudoaneurysm, and panlobular emphysema. He opined that appellant's emphysema was "most likely" related to his previous work environment as he did not have any history of smoking.

In an August 8, 2019 memorandum, the employing establishment noted that appellant was employed as an assistant port director, which was primarily a supervisory and administrative position that did not require constant exposure to the elements. It indicated that appellant's work environment was surrounded by open desert with associated dust and wind. The employing establishment attached a position description for an assistant port director, which listed appellant's employment duties.

By decision dated August 28, 2019, OWCP denied appellant's occupational disease claim, finding that the alleged factors of his federal employment had not been established. Specifically, it explained that he failed to respond to OWCP's request for a detailed statement regarding how his federal employment caused or contributed to his claimed condition. OWCP, therefore, concluded that the requirements had not been met to establish an injury as defined by FECA.

On September 25, 2019 appellant requested reconsideration.

By decision dated October 29, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On April 8, 2020 appellant, through counsel, requested reconsideration.

In a June 7, 2019 report, Dr. Fernandez noted that appellant had shortness of breath and a cough. He indicated that appellant was recently hospitalized with multilobar pneumonia, pneumothorax, acute renal failure, and influenza A. Dr. Fernandez examined appellant and diagnosed interstitial lung disease, SS-A antibody positive, post-influenza syndrome, history of DVT, and history of pseudoaneurysm.

A computerized tomography (CT) scan of appellant's chest, dated June 18, 2019, revealed subpleural reticulation and distortion consistent with pulmonary fibrosis, right upper lobe medial noncalcified nodule, right lower lobe medial nodule, small-to-moderate loculated right pleural effusion, and small hiatal hernia. A plethysmography report of even date revealed moderate restrictive lung defect, increased airway resistance, and a decrease in diffusing capacity.

In a June 20, 2019 report, Dr. Fernandez noted that appellant had experienced some improvement with his cough and shortness of breath. He indicated that appellant was no longer hypoxic and stopped having palpitations. Dr. Fernandez examined appellant and diagnosed interstitial lung disease, SS-A antibody positive, post-influenza syndrome, history of DVT, and history of pseudoaneurysm.

On October 22, 2019 Dr. Fernandez noted that appellant had pain in his right ribs. He examined appellant and again diagnosed interstitial lung disease, SS-A antibody positive, post-influenza syndrome, history of DVT, history of pseudoaneurysm, and panlobular emphysema. Dr. Fernandez again opined that appellant's emphysema was "most likely" related to his previous work environment as he did not have any history of smoking.

A CT scan of appellant's chest, dated January 8, 2020, revealed parenchymal distortion suggestive of an interstitial lung disease, partly calcified nodule in the right upper lobe, moderate centrilobular emphysema, persistent small loculated right pleural effusion, and persistent small hiatal hernia. A plethysmography report of even date revealed moderate obstructive lung defect, mild restrictive lung defect, increased airway resistance, and a decrease in diffusing capacity.

In a February 3, 2020 report, Dr. Fernandez noted that appellant continued to have a persistent cough despite medication. He indicated that appellant no longer experienced shortness of breath, but felt weak. Dr. Fernandez examined appellant and again diagnosed interstitial lung disease, SS-A antibody positive, post-influenza syndrome, history of DVT, history of pseudoaneurysm, and panlobular emphysema.

By decision dated June 30, 2020, OWCP denied modification of the August 28, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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 timely filed within the applicable time limitation of FECA,⁴ 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.⁵ 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.⁶

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (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.⁷

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty, as alleged.

To establish a claim for compensation in an occupational disease claim, an employee must submit a statement which identifies the factors of employment believed to have caused his or her claimed condition.⁸ Appellant has not provided sufficient detail to establish that an occupational exposure occurred, as alleged, because he has not adequately described the circumstances of his injury, the duties he was performing, which caused his injury, or the mechanism of injury.⁹

In a development letter dated July 19, 2019, OWCP requested that appellant provide detailed information regarding the employment-related exposure or contact he believed contributed to his condition. However, appellant did not respond to OWCP's development questionnaire or otherwise provide a detailed narrative statement describing the employment

³ *Id.*

⁴ *D.D.*, Docket No. 19-1715 (issued December 3, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *Y.G.*, Docket No. 20-0688 (issued November 13, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *C.H.*, Docket No. 19-1781 (issued November 13, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *T.M.*, Docket No. 20-0712 (issued November 10, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ *Id.*

⁹ *See D.J.*, Docket No. 20-0684 (issued September 21, 2020); *D.C.*, Docket No. 18-0082 (issued July 12, 2018).

factors, which he believed contributed to his claimed condition. While the record contains a position description and medical reports from Dr. Fernandez opining that appellant's emphysema was most likely related to his previous work environment, there is no factual information describing the specific employment-related exposure or contact believed to have contributed to his emphysema.¹⁰

Consequently, as appellant has not presented sufficient factual evidence to identifying specific employment factors or conditions alleged to have caused or contributed to his claimed medical condition, the Board finds that he has not met his burden of proof.¹¹

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of the Board's 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 an injury in the performance of duty, as alleged.

¹⁰ *Id.*

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 30, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 25, 2021
Washington, DC

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

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

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