

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

_____)	
T.M., Appellant)	
)	
and)	Docket No. 21-0556
)	Issued: April 13, 2022
DEPARTMENT OF THE NAVY, MARINE)	
CORPS LOGISTICS BASE, Albany, GA,)	
Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 25, 2021 appellant filed a timely appeal from a February 12, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that on appeal, appellant submitted 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 OWCP properly found that appellant's occupational disease claim constituted a duplicate claim.

FACTUAL HISTORY

On July 23, 2019 appellant, then a 64-year-old former heavy mobile equipment mechanic, filed an occupational disease claim (Form CA-2) alleging that he sustained sleep apnea and pulmonary disease causally related to factors of his federal employment. He attributed his condition to exposure to the chemical Turco 6776 Thin during the course of his federal employment. Appellant noted that he first became aware of his condition on October 4, 2002 and realized its relation to his federal employment on January 3, 2018. OWCP assigned OWCP File No. xxxxxx263.

Appellant had previously filed an occupational disease claim on December 12, 2002 alleging that he had experienced chest pains, heart and eye problems, fatigue, and drowsiness causally related to chemical exposure to Turco 6776. OWCP assigned OWCP File No. xxxxxx738.

In OWCP File No. xxxxxx738, a nurse with the employing establishment's clinic, on October 4, 2002 indicated that appellant believed that exposure to Turco 6776 had overexposed his central nervous system causing chest pains and breathing difficulties, including shortness of breath.

By decision dated March 17, 2003, issued under OWCP File No. xxxxxx738, OWCP denied appellant's claim for sinus tachycardia causally related to the accepted employment factors. By decisions dated June 24, August 29, and November 26, 2003, and July 13, 2004, it denied modification of its finding that the evidence failed to establish that his condition of tachycardia was caused or aggravated by his employment.³

Under the current OWCP File No. xxxxxx263, in a development letter dated February 20, 2020, OWCP requested that appellant submit additional evidence in support of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. By separate letter of the same date, OWCP also requested additional information from the employing establishment. It afforded both appellant and the employing establishment 30 days to provide the requested information.

In a response dated March 11, 2020, appellant asserted that he had been exposed to the chemical Turco 6776 for 10 to 12 hours daily 5 to 7 days a week without being provided with respiratory protection or training. He indicated that the employing establishment provided him with a dust mask and upgraded the ventilation system. Appellant related that he also sustained chest pains, difficulty breathing, and tachycardia, and that the employing establishment had notice

³ Appellant appealed to the Board. By decision dated February 14, 2005, the Board affirmed OWCP's 2003 and 2004 decisions denying his claim for an employment-related cardiac condition. Docket No. 04-2057 (issued February 14, 2005).

of these conditions on October 4, 2002. He maintained that he had learned on May 20, 2019 that his sleep apnea resulted from the chemical exposure. Appellant advised that his symptoms including his breath stopping during sleep, rapid heartbeat, and weakness. He indicated that he had filed a claim for chest pain and difficulty breathing on October 4, 2002, when the condition started, but was unaware that the reason was sleep apnea until May 14, 2019.

On March 6, 2020 the employing establishment described appellant's work around the engine cleaning section. It advised that M.C., a former coworker of appellant who was now a supervisor, was unsure of the exact chemical used, but advised that the engine cleaning substance was used no more than one year.

In a report dated April 22, 2020, Dr. Robert V. Glover, Jr., Board-certified in cardiovascular disease, noted that appellant initially claimed that he was exposed on October 4, 2002 to Turco 6776 Thin. Dr. Glover opined that the chemical exposure had caused an aggravation of paroxysmal supraventricular tachycardia (PSVT). Dr. Glover noted that a sleep study performed January 3, 2018 showed obstructive sleep apnea, and that appellant "now claims that the Turco 6776 Thin exposure causes dyspnea (shortness of breath...) and the sleep apnea or at least aggravates them." He opined that more likely than not the chemical can cause or aggravate dyspnea by damaging tissues and that the "baseline shortness of breath could worsen the sleep apnea."

In a decision dated May 14, 2019, the Department of Veterans Affairs denied appellant's claim for sleep apnea. It noted that he had a diagnosis of sleep apnea from September 15, 2005 to February 20, 2019, but found no connection with his military service.

By decision dated May 29, 2020, OWCP denied appellant's compensation claim as untimely filed pursuant to 5 U.S.C. § 8122(a). It found that he had not filed his occupational disease claim within three years of December 13, 2004, the date of last exposure to the factors implicated as causing his condition, and that there was no indication that his supervisor had knowledge of the injury within 30 days.

On June 1, 2020 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

In a statement dated September 8, 2019, the employing establishment advised that appellant's claim had been denied by OWCP in decisions dated March 17 and August 29, 2003. It noted that he had multiple open and closed claims.

By decision dated February 12, 2021, OWCP's hearing representative affirmed the May 29, 2020 decision as modified to reflect that the basis for the denial was that appellant had filed a duplicate claim.⁴

⁴ The hearing representative reviewed factual and medical evidence from OWCP File Nos. xxxxxx203 and xxxxxx738, noting that medical evidence from the other claims included diagnoses of pulmonary problems and sleep apnea and, thus, determined that appellant's current claim duplicated OWCP File Nos. xxxxxx203 and xxxxxx738. The hearing representative instructed OWCP, on remand, to combine OWCP File Nos. xxxxxx203 and xxxxxx738 with the current claim.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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,⁶ 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.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

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.⁹

OWCP's procedures contemplate that duplicate cases should not be created and that development should not occur under the duplicate case.¹⁰

ANALYSIS

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

In the current case, appellant has alleged that he sustained sleep apnea and a pulmonary condition causally related to his exposure to Turco 6776 Thin in the course of his federal employment. He advised that he learned in May 2019 that his sleep apnea was related to chemical exposure. As OWCP has not previously adjudicated whether appellant sustained sleep apnea or pulmonary disease causally related to factors of his federal employment, the Board finds that appellant's claim for an occupational disease under OWCP File No. xxxxxx263 is not a duplicate of his claim in OWCP File No. xxxxxx738. Consequently, OWCP File No. xxxxxx263 will be

⁵ *Supra* note 1.

⁶ *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁹ *T.W.*, Docket No. 20-0767 (issued January 13, 2021); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

¹⁰ *See* Federal (FECA) Procedure Manual, Part 1 -- Mail and Files, *Creation of Cases*, Chapter 1.400.7 (February 2000); *see also S.W.*, Docket No. 16-0219 (issued April 5, 2016); *W.M.*, Docket No. 09-1609 (issued April 5, 2010).

remanded to OWCP for a *de novo* review.¹¹ Following this and such other development as deemed necessary, OWCP 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 February 12, 2021 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: April 13, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹¹ See generally *J.M.*, Docket No. 16-1570 (issued May 24, 2018).