

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

S.B., Appellant)	
)	
and)	Docket No. 21-0856
)	Issued: February 4, 2022
DEPARTMENT OF DEFENSE, DEFENSE)	
FINANCE & ACCOUNTING SERVICE,)	
Indianapolis, IN, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On May 19, 2021 appellant, through counsel, filed a timely appeal from a May 4, 2021 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 an 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 4, 2021 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 her burden of proof to establish a medical condition causally related to the accepted employment exposure.

FACTUAL HISTORY

On July 29, 2020 appellant, then a 64-year-old military pay technician filed an occupational disease claim (Form CA-2) alleging that she developed legionella pneumonia due to factors of her federal employment, including exposure to contaminated tap water in the employing establishment restroom. She noted that she first became aware of her condition on July 11, 2017 and realized its relation to factors of her federal employment on August 3, 2017. Appellant stopped work on July 11, 2017.⁴

In a July 14, 2017 patient summary, Dr. Keyvan Ravakhah, a Board-certified internist, noted that appellant was diagnosed with pneumonia, rectal bleeding, and legionella infection.

In an August 4, 2020 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor regarding the accuracy of her statements. It afforded both parties 30 days to respond.

In an undated statement, appellant noted that she normally used bottled water to brush and floss her teeth during her lunch break at work, but that she was running low on supplies as her last day at work, July 28, 2017, approached. She indicated that she used the restroom tap water to brush and floss. Appellant asserted that on July 7, 2017 she ingested water in the employing establishment's 17th floor women's restroom while cupping the water to rinse her mouth. She alleged that she was informed by the emergency room doctor that she had legionella pneumonia. Appellant indicated that she had only been to work and home and that the only changes she experienced was using water at work to brush her teeth. She asserted that employees often used bottled water as they did not trust the water fountains at the employing establishment. Appellant related that she began feeling ill on July 7, 2017 and collapsed in the hallway at work on July 11, 2017. She was hospitalized until July 14, 2017.

In a July 11, 2017 statement, appellant again noted that she was diagnosed with legionella pneumonia in the emergency room. She contended that the employing establishment's lack of proper disinfection procedures failed to prevent/inhibit legionella bacteria growth. Appellant asserted that legionella bacteria was found in the 17th floor women's restroom. She further noted that she used water in that restroom around the last two weeks of June through July 7, 2017. Appellant contended that she contracted a full body infection, which caused fever, chills, rectal bleeding, vomiting, and diarrhea. She noted that the pneumonia particularly affected her lungs

⁴ A notification of personnel action Standard Form (SF)-50B indicates that a ppellant resigned from the employing establishment, effective July 28, 2017.

due to preexisting sarcoidosis. Appellant indicated that she had not previously experienced similar conditions.

A July 25, 2017 lab report revealed that multiple sites at the employing establishment, including several restroom sinks, tested positive for the presence of legionella bacteria in the water.

Appellant also submitted a copy of a study detailing August 3, 2017 testing of legionella bacteria samples at the employing establishment. The testing, completed by a private company, revealed results that were positive for presence of legionella bacteria at multiple sites, including the restroom sink that appellant allegedly used.

In an August 11, 2017 e-mail, Amy Anter, a registered nurse and a communicable disease investigator, noted that the water samples from the employing establishment contained low levels of legionella, which required no immediate action.

In an April 21, 2019 narrative report, Dr. Debra A. DeJoseph, a Board-certified internist, reviewed appellant's medical records, including treatment records regarding legionella. She indicated that appellant had a preexisting medical history, including sarcoidosis, which had been in remission since 2000. Dr. DeJoseph further noted that appellant was hospitalized on July 11, 2017 after becoming acutely dyspneic at work and was diagnosed with legionella pneumonia. She reviewed a report addressing the legionella bacteria samples at the employing establishment and noted that September 2017 testing of the women's restroom sinks showed that legionella was growing in the water line. Dr. DeJoseph opined that "the deterioration in [appellant's] work performance was directly impacted by the health problems from legionella, and that this poor performance caused a downward spiral in her ability to work." She further asserted that, "This experience has left [appellant] permanently changed and unable to work at present."

In a September 1, 2020 response to OWCP's development questionnaire, the employing establishment controverted appellant's claim.

By decision dated December 4, 2020, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish a medical condition causally related to the accepted employment exposure.

On December 11, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant submitted a laboratory report that provided blood culture results.

A hearing was held on March 10, 2021. By decision dated May 4, 2021, the hearing representative affirmed OWCP's December 4, 2020 decision.

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 timely filed within the applicable time

⁵ *Supra* note 2.

limitation of FECA,⁶ 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: (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 claimant.⁹

Causal relationship is a medical issue, and the evidence required to establish causal relationship is rationalized medical opinion evidence.¹⁰ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and specific employment factors identified by the employee.¹¹

In a case in which a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.¹²

ANALYSIS

The Board finds that this case is not in posture for decision. In her April 21, 2019 narrative report, Dr. DeJoseph reviewed appellant's medical records. She indicated that appellant had a preexisting medical history, including sarcoidosis, which had been in remission since 2000. Dr. DeJoseph further noted that appellant was hospitalized on July 11, 2017 after becoming acutely dyspneic at work and was diagnosed with legionella pneumonia. She reviewed a report addressing the legionella bacteria samples at the employing establishment and noted that

⁶ *J.W.*, Docket No. 18-0678 (issued March 3, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *J.S.*, Docket No. 18-0657 (issued February 26, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ *L.J.*, Docket No. 19-1343 (issued February 26, 2020); *R.R.*, Docket No. 18-0914 (issued February 24, 2020); *Delores C. Ellyett*, 41 ECAB 992 (1990).

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

¹⁰ *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

¹¹ *R.G.*, Docket No. 18-0792 (issued March 11, 2020); *D.J.*, Docket No. 19-1301 (issued January 29, 2020); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹² *A.O.*, Docket No. 20-0038 (issued August 26, 2020); *B.H.*, Docket No. 18-1693 (issued July 20, 2020); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

September 2017 testing of the women’s restroom sinks showed that legionella was growing in the water line. Dr. DeJoseph opined that “the deterioration in [appellant’s] work performance was directly impacted by the health problems from legionella, and that this poor performance caused a downward spiral in her ability to work.” She further asserted that “This experience has left [appellant] permanently changed and unable to work at present.” The Board has long held that it is unnecessary that the evidence of record in a case be so conclusive as to suggest causal connection beyond all possible doubt. Rather, the evidence is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound, and logical.¹³ Although the medical report by Dr. DeJoseph is insufficient to meet appellant’s burden of proof to establish her claim, it does raise an uncontroverted inference of causal relationship between her diagnosed conditions and the accepted employment exposure to legionella bacteria, sufficient to require OWCP to further develop the claim.¹⁴

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁵ It has an obligation to see that justice is done.¹⁶

On remand, OWCP shall refer appellant to a specialist in the appropriate field of medicine, along with the case record and a statement of accepted facts. Its referral physician shall provide a well-rationalized medical opinion as to whether her diagnosed pneumonia, rectal bleeding, and legionella infection were causally related to the accepted employment exposure. If the physician opines that the diagnosed conditions are not causally related, he or she must explain with rationale how or why the opinion differs from that of Dr. DeJoseph. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹³ *B.C.*, Docket No. 20-0498 (issued August 27, 2020); *W.M.*, Docket No. 17-1244 (issued November 7, 2017); *Kenneth J. Deerman*, 34 ECAB 641, 645 (1983).

¹⁴ *See E.G.*, Docket No. 19-1296 (issued December 19, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁵ *Id.* *See also A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

¹⁶ *S.M.*, Docket No. 19-1634 (issued August 25, 2020); *see B.C.*, Docket No. 15-1853 (issued January 19, 2016); *John J. Carlone*, *supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the May 4, 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: February 4, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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