

² 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On September 11, 2018 appellant, then a 54-year-old toxic material handler/leader, filed an occupational disease claim (Form CA-2) alleging pulmonary complications from inhalation of vapors from toxic agent “HD mustard gas.” He noted that he first realized his condition on October 30, 2017 and its relation to his federal employment on November 2, 2017. Appellant explained that contaminated material was accidentally sent to his station without prior notification of the proper level of protective dress needed to handle the materials and prevent the inhalation of toxic mustard gas vapors.

In a development letter dated September 18, 2018, OWCP advised appellant that additional factual and medical evidence was needed to establish his claim. It asked him to submit a rationalized medical opinion, which explained how a specific exposure at work caused or contributed to a diagnosed medical condition and to complete a development questionnaire. OWCP afforded appellant 30 days to submit the necessary evidence.

In an undated statement, J.R., Field Operations Division Chief, advised that appellant and another coworker’s potential exposure may have occurred while handling hazardous waste that was contaminated with liquid mustard gas. He noted that, while preparing the waste for the monitoring process in an open-air area located next to the monitoring facility, appellant was not wearing personal protective equipment, except government-issued cotton undergarments. J.R. indicated that, at the start of the operation, both appellant and the coworker had recounted to him that they thought they smelled something. He further indicated that some of the double-bagged items were contaminated, and that the contamination was found once the items were monitored inside the monitoring facility.

OWCP also received copies of appellant’s position description, and a safety data sheet.

By decision dated October 26, 2018, OWCP denied appellant’s claim, finding that the evidence of record was insufficient to establish that the exposure to vapors from toxic agent HD mustard gas occurred as alleged. It noted that he had not submitted a statement detailing his specific exposure. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On November 12, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review. During the telephonic hearing held

³ Docket No. 20-0229 (issued October 9, 2020).

on March 4, 2019, appellant testified that he was exposed to vapors of liquid mustard gas as he was not wearing a mask while handling the hazardous material.

OWCP received additional medical evidence, including diagnostic studies dated from August 5, 2008 through August 6, 2018.

In an October 3, 2018 report, an advance practice registered nurse (APRN) noted that appellant was diagnosed with chronic obstructive pulmonary disease (COPD) on September 7, 2018.

By decision dated May 1, 2019, an OWCP hearing representative affirmed the October 26, 2018 decision. The hearing representative accepted that appellant was required to move approximately 30 bags of liquid mustard agent from a truck to a storage shed, but found that he failed to supply sufficient factual evidence to support his actual exposure to mustard agent.

On May 20, 2019 appellant, through counsel, requested reconsideration. Evidence received included an undated statement to his congressional representative describing the events of October 30, 2017. Medical evidence was also submitted.

In an April 17, 2019 report, Dr. John Watts, a Board-certified family practitioner, indicated that appellant had a history of tobacco use, but never had any respiratory issues until the mustard gas exposure at work. He indicated that the mustard gas exposure exacerbated appellant's underlying COPD. Dr. Watts also noted work restrictions.

Reports from Dr. Dipti Baral, an internist and pulmonologist, dated April 18 through 22, 2019 were received. In the April 18, 2019 report, Dr. Baral noted that appellant had severe COPD with positive bronchodilator response, exertional dyspnea, that he was a chronic smoker and had a history of mustard gas exposure. He indicated that, while appellant claimed that he had absolutely no respiratory symptoms prior to the mustard gas exposure, it was hard to confirm if the mustard gas exposure worsened his respiratory function. Dr. Baral explained that, based on the documents and history received, he believed that appellant most likely had emphysema and COPD prior to the mustard gas exposure and that it was possible that dyspnea came to his attention after the exposure incident. In the absence of previous pulmonary function tests (PFTs), he could

not tell if the exposure caused appellant to develop airway reactivity on the already severe airways obstruction. Dr. Baral noted that positive bronchodilator response was possible in COPD as well.

Diagnostic function tests/spirometry reports dated August 5, 2009, July 28 and August 4, 2010, August 6 and 13, 2012, August 13, 2014, and March 16, 2018 were received.

OWCP also received a November 1, 2017 health record and two May 29, 2019 letters from an advanced practice registered nurse, which noted that appellant was diagnosed on September 7, 2018 with COPD and provided mask restrictions while performing physical exertion.

By decision dated August 9, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim.

OWCP subsequently received a March 28, 2018 computerized tomography (CT) chest scan which revealed no acute cardiopulmonary pathology. A July 31, 2019 CT scan related an impression of moderate emphysematous changes and pulmonary granulomata.

On November 7, 2019 appellant, through counsel, appealed to the Board. By decision dated October 9, 2020, the Board found that the case was not in posture for decision. It found that OWCP improperly denied appellant's request for reconsideration of the merits of his claim as the underlying issue was factual in nature and appellant had submitted an updated statement, which provided a further factual description of the October 30, 2017 employment exposure to mustard agent vapors. Accordingly, the Board remanded the case to OWCP to review the evidence of record and, following any further development deemed necessary, issue an appropriate decision.⁴

Thereafter, OWCP issued a January 6, 2021 development letter, requesting additional information from the employing establishment. It afforded the employing establishment 30 days to respond.

On February 5, 2021 only a blank page entitled: "Agency Response -- Initial Development" was received.

By decision dated February 24, 2021, OWCP modified its August 9, 2019 decision to find that the factual component of the claim had been established. The claim remained denied, however, as the medical evidence of record was insufficient to establish causal relationship between the diagnosed medical condition and the accepted employment exposure.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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

⁴ *Id.*

⁵ *Supra* note 2.

time limitation period 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 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 opinion evidence to resolve the issue.¹⁰ The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 the specific employment factors identified by the claimant.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 appellant has not met his burden of proof to establish a pulmonary condition causally related to the accepted employment exposure.

In his April 18, 2019 report, Dr. Baral provided a history of injury and indicated that it was hard to confirm if appellant's employment exposure worsened his respiratory function. He noted that it was most likely that appellant had emphysema and COPD prior to the mustard gas exposure

⁶ *C.D.*, Docket No. 20-0858 (issued November 30, 2020); *R.M.*, Docket No. 20-0342 (issued July 30, 2020); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *V.P.*, Docket No. 20-0415 (issued July 30, 2020) *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ 20 C.F.R. § 10.115; *S.A.*, Docket No. 20-0458 (issued July 23, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

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 *L.S.*, Docket No. 19-1769 (issued July 10, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹¹ *B.C.*, Docket No. 20-0221 (issued July 10, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013). *R.G.*, Docket No. 18-0917 (issued March 9, 2020); *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

and that dyspnea came to appellant's attention after the incident. Dr. Baral opined that, in the absence of previous PFTs, he could not tell if the exposure caused him to develop airways reactivity on the already severe airway obstruction, noting that positive bronchodilator response was possible in COPD as well. The Board has held that speculative and equivocal medical opinions regarding causal relationship are of diminished probative value.¹³

In an April 17, 2019 report, Dr. Watts reported a history of tobacco use, but that appellant never had any respiratory issues until he was exposed to mustard gas at work. He opined that the mustard gas exacerbated appellant's underlying COPD. However, the Board has held that the mere fact that symptoms arise during a period of employment or produce symptoms revelatory of an underlying condition does not establish a causal relationship between a diagnosed condition and employment factors.¹⁴ A medical opinion must explain how the implicated employment factors physiologically caused, contributed to, or aggravated the specific diagnosed conditions.¹⁵ This is especially important in light of the fact that appellant has a history of tobacco use and prior history of COPD. Lacking such an explanation, Dr. Watts' opinion is insufficient to meet appellant's burden of proof.¹⁶

Appellant submitted several reports from an advanced practice registered nurse. These reports do not constitute competent medical evidence because nurses are not considered physicians as defined under FECA.¹⁷ Consequently, the medical findings and/or opinions of a nurse will not suffice for purposes of establishing entitlement to compensation benefits.¹⁸

The record also contains several diagnostic reports, including PFT/spirometry reports, CT scan reports of the abdomen and x-ray reports of the chest. The Board has held that diagnostic studies, standing alone, lack probative value on the issue of causal relationship, as they do not provide an opinion as to whether the employment incident caused any of the diagnosed conditions.¹⁹ This evidence is, therefore, insufficient to establish appellant's claim.

¹³ See *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *R.C.*, Docket No. 18-1695 (issued March 12, 2019); *Ricky S. Storms*, 52 ECAB 349 (2001).

¹⁴ *A.S.*, Docket No. 19-1955 (issued April 9, 2020).

¹⁵ *S.C.*, Docket No. 20-0492 (issued May 6, 2021); *C.M.*, Docket No. 19-0360 (issued February 25, 2020).

¹⁶ *Id.*

¹⁷ Section 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *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); *J.D.*, Docket No. 16-1752 (issued March 1, 2017) (a nurse is not considered a physician as defined under FECA); *L.S.*, Docket No. 19-1231 (issued March 30, 2021).

¹⁸ *Id.*

¹⁹ See *C.B.*, Docket No. 20-0464 (issued July 21, 2020).

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

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 pulmonary condition causally related to the accepted employment exposure.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 2, 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