

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

T.W., Appellant)
and) Docket No. 22-0722
DEPARTMENT OF JUSTICE, FEDERAL) Issued: September 29, 2022
BUREAU OF PRISONS, FEDERAL)
CORRECTIONAL COMPLEX, BUTNER,)
Butner, NC, Employer)

)

Appearances:

Sally F. LaMacchia, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On April 13, 2022 appellant, through counsel, filed a timely appeal from a December 30, 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.

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 her burden of proof to establish disability from work beginning September 18, 2019 causally related to her accepted employment injury.

FACTUAL HISTORY

On August 11, 2017 appellant, then a 45-year-old medical records technician, filed an occupational disease claim (Form CA-2) alleging that she sustained multiple autoimmune diseases, hypothyroid, lymphocytic colitis, celiac disease, chronic sinus infections, iron and B-12 deficiency, multiple allergies, chronic joint pain and swelling, vertigo, fainting, headaches, and chronic fatigue causally related to factors of her federal employment. OWCP accepted the claim for an allergy from mold exposure. It paid appellant wage-loss compensation for disability on the supplemental rolls, effective December 4, 2017, and on the periodic rolls, effective January 7, 2018.

In a report dated May 29, 2018, Dr. Sonia Rapaport, who specializes in family medicine, diagnosed chronic fatigue syndrome and multiple chemical sensitivity due to appellant's employment-related condition. She advised that she "met criteria for environmentally-acquired illness (EAI) due to exposure to mold and inflammasgens" in her water damaged building. Dr. Rapaport provided findings on examination and advised that, while the cause of chronic fatigue syndrome was unknown, appellant's "past exposure to significantly water damaged buildings at work appear to have triggered her illness." She advised that appellant remain off work until her workplace received adequate remediation.

On February 14, 2019 OWCP referred appellant to Dr. Douglas K. Holmes, a Board-certified otolaryngologist, for a second opinion examination.

Based on Dr. Holmes' March 7, 2019 report, by decision dated June 5, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits effective June 6, 2019.

On June 17, 2019 appellant returned to regular duty without restrictions.

On July 3, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated August 28, 2019, OWCP's hearing representative reversed the June 5, 2019 decision. The hearing representative found that OWCP had not provided Dr. Holmes with a statement of accepted facts (SOAF) that reflected the accepted condition of allergy from mold exposure and further found that his opinion was conclusory in nature. The hearing representative additionally determined that OWCP had not resolved the issue of whether appellant sustained additional conditions causally related to her exposure to mold at work and instructed OWCP, upon return of the case record, to refer appellant for a second opinion examination with a Board-certified medical toxicologist or environmental specialist for a second opinion examination on the issue of claim expansion. The hearing representative found that OWCP should reinstate medical benefits and pay wage-loss compensation until the date of her

return to work on June 17, 2019, noting that she could file claims for compensation (Form CA-7) for any compensation claimed subsequent to that date.

In a report dated September 18, 2019, Dr. Catherina M. Bostelman, Board-certified in family practice, noted that she had treated appellant on September 12, 2019 for a viral upper respiratory infection with left otitis media. She diagnosed a viral upper respiratory infection with an exacerbation of asthma and resolved left otitis media. In an accompanying work note, Dr. Bostelman found that appellant should be excused from work from September 16 to 20, 2019.

On September 30, 2019 appellant filed a claim for compensation (Form CA-7) for disability from work from September 24 to 27, 2019. On October 11, 2019 she filed a Form CA-7 requesting compensation due to disability from work for the period September 30 to October 11, 2019.

In development letters dated October 8 and 18, 2019, OWCP requested that appellant provide a reasoned medical report explaining why she was unable to work during the claimed periods due to her accepted employment injury. It afforded her 30 days to submit the requested evidence.

In a September 19, 2019 report, Dr. Rapaport advised that she had diagnosed appellant in May 2018 with chronic fatigue syndrome and multiple chemical sensitivity and noted that she met the criteria for environmentally-acquired illness. She recommended that she not return to work for 6 to 12 months and only if remediation was performed at her work location. Dr. Rapaport noted that appellant had returned to work on June 17, 2019. Appellant advised Dr. Rapaport that there were signs of mold at the building and ceiling leaks. Dr. Rapaport related, “Over the [three] months, after her return to work, [appellant] reported increased symptoms including shortness of breath, persistent rhinorrhea and tearing, wheezing, sore throat, and fatigue for which she reports she has used all of her sick leave to address.” She discussed her complaints of shortness of breath, sinus pressure, wheezing, and eye symptoms and advised that pulmonary function studies were below normal and required the use of steroid inhalers. Dr. Rapaport opined that appellant’s “illness is exacerbated by the exposures to water damaged buildings at work” and recommended that she had not return as “prior efforts to direct a safe environment for her have not been successful. Given appellant’s underlying condition, repeat exposure to the inflammagens found in water-damaged buildings are likely to lead to exacerbations of her symptoms.” Dr. Rapaport recommended that appellant remain off work for 12 months.

On October 28, 2019 OWCP referred appellant, with an updated SOAF, to Dr. Ashish Singh, a Board-certified internist and pulmonologist, for a second opinion examination. It requested that he provide an opinion on whether she could return to her usual position, and, if not, the extent of any employment-related disability. OWCP further asked that Dr. Singh address whether appellant’s condition had resolved and the diagnosed conditions causally related to mold exposure.

On October 30, 2019 counsel noted that appellant had returned to work on June 17, 2019 because OWCP had terminated her compensation. She stopped work on September 15, 2019 on the advice of her physician. Counsel maintained that Dr. Rapaport’s September 19, 2019 report supported disability from employment.

On November 6, 2019 counsel questioned why OWCP had scheduled appellant with a pulmonary disease physician instead of a toxicologist or environmental specialist as instructed by OWCP's hearing representative. In a November 7, 2019 memorandum of telephone call (Form CA-110), OWCP noted that there were no toxicologists within a reasonable distance of her location.

By decision dated December 9, 2019, OWCP denied appellant's claim for compensation for disability from work beginning September 18, 2019 causally related to her accepted employment injury. It found that her treating physician had determined that she had sustained a new injury following her return to work.

Pulmonary function testing, obtained on March 12, 2021, yielded normal findings.

In a report dated April 14, 2020, Dr. Singh diagnosed asthma due to appellant's work injury that was currently well controlled. He opined that she was capable of her date-of-injury position, but noted that her symptoms had returned when she resumed work. Dr. Singh related, "[Appellant] can return to her date[-]of[-]injury job, but the location she will be returning to should be professionally assessed for mold before her return...." He found that she had a predisposition to allergies that was "mostly likely aggravated by exposure to mold. She reports her symptoms medically improved when she stopped working." Dr. Singh also recommended that appellant work from home, if possible. He advised that she currently had minimal effects from her exposure based on her normal spirometry test.

On June 29, 2020 the Office of Personnel Management (OPM) approved appellant's request for disability retirement due to postural orthostatic tachycardia syndrome and toxic mold exposure.³

In a supplemental report dated August 30, 2020, Dr. Singh indicated that appellant had a predisposition to allergens unrelated to her work and that as she was exposed to mold at work, it had likely aggravated her underlying allergic predisposition. He related that, if she had not been exposed to mold, she would not have developed the symptoms, which had mostly resolved when she stopped work. Dr. Singh noted that he was not "an allergist or an expert in building-related illnesses." He agreed that appellant could resume work, but that the area to which she returned "should not put her at risk of mold exposure."

On September 24, 2020 the employing establishment advised that appellant had retired, effective July 18, 2020, on disability.

On December 3, 2019 Dr. Bostelman evaluated appellant for symptoms of an upper respiratory infection. She diagnosed asthma and sinusitis.

³ On May 5, 2020 appellant filed a notice of recurrence (Form CA-2a) for disability from work beginning August 22, 2019 causally related to her accepted employment injury. She advised that she stopped work on September 13, 2019. In a November 12, 2020 response, OWCP advised that appellant's recurrence of disability was for medical treatment only, noting that it had denied her claim for wage-loss compensation beginning September 24, 2019. It determined that adjudication of her claimed recurrence of disability was not necessary.

Counsel, on November 11, 2020, noted that OWCP had denied wage-loss compensation prior to obtaining the supplemental report from Dr. Singh. She asserted that a short return to work was insufficient to shift the burden of proof regarding disability.

On December 7, 2020 counsel requested reconsideration. She noted that OWCP's hearing representative had reversed OWCP's termination of compensation and found that it should resolve the issue of whether appellant had additional medical conditions. Counsel indicated that appellant stopped work on September 16, 2019, less than 90 days from her return to work. She reviewed the medical reports of record and asserted that OWCP had improperly placed the burden on appellant as she had only returned to work for a short period.

By decision dated December 30, 2021, OWCP denied modification of its December 7, 2020 decision. It noted that counsel had raised arguments regarding Dr. Singh's report, but did not specifically consider his opinion.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim including, the fact that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁵

Under FECA, the term disability means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁶ Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.⁷ An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.⁸ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.⁹

⁴ *Supra* note 2.

⁵ A.R., Docket No. 20-0583 (issued May 21, 2021); S.W., Docket No. 18-1529 (issued April 19, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989); see also *Nathaniel Milton*, 37 ECAB 712 (1986).

⁶ 20 C.F.R. § 10.5(f); see *J.M.*, Docket No. 18-0763 (issued April 29, 2020); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁷ *D.W.*, Docket No. 20-1363 (issued September 14, 2021); *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

⁸ See *M.W.*, Docket No. 20-0722 (issued April 26, 2021); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

⁹ See *A.R.*, *supra* note 5; *D.R.*, Docket No. 18-0323 (issued October 2, 2018).

ANALYSIS

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

By decision dated August 28, 2019, OWCP's hearing representative reversed OWCP's June 5, 2019 termination decision, finding that it had not met its burden of proof, and remanded the case for OWCP to further development the issue of whether appellant had sustained additional employment-related conditions.

Appellant stopped work in September 2019. In a report dated September 19, 2019, Dr. Rapaport diagnosed chronic fatigue syndrome, multiple chemical sensitivity, and an environmentally-acquired illness. She noted that appellant related that when she returned to work on June 17, 2019 her work location had signs of mold, and that she had experienced increasing symptoms of wheezing, shortness of breath, rhinorrhea, sore throat, and fatigue. Dr. Rapaport found that her pulmonary function studies were below normal. She opined that appellant's condition was aggravated by exposure to a water-damaged building at work and recommended that she not work for a year.

On October 28, 2019 OWCP referred appellant to Dr. Singh for a second opinion examination. It requested that he address whether she could resume her date-of-injury position and the extent of any work restrictions. In a report dated April 14, 2020, Dr. Singh diagnosed asthma and found that appellant could return to her usual employment if her work area had been professionally assessed for mold. On August 30, 2020 he found that appellant could work in an area with no mold exposure.

In the case of *William A. Couch*,¹⁰ the Board found that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before a final decision is issued. OWCP denied appellant's claim for wage-loss compensation beginning September 2019 after it had requested that Dr. Singh address the extent of her disability from employment, but prior to receiving his report. In its December 30, 2021 decision denying modification, it failed to consider Dr. Singh's opinion that appellant had work restrictions of no exposure to mold and that her work area required a professional assessment for mold for her to be able to return. While it found that she had alleged a new injury based on new work exposure, Dr. Singh's report is relevant to the issue of whether she had continued limitations because of her accepted work injury. As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to the subject matter of the claim properly submitted to OWCP be reviewed and addressed.¹¹ The case will, therefore, be remanded to OWCP for proper consideration of the evidence that was of record at the time of its December 30, 2021 decision. Following this and any further development deemed necessary, it shall issue a *de novo* decision.

¹⁰ 41 ECAB 548 (1990); *see also* T.S., Docket Nos. 20-1177 & 20-1296 (issued May 28, 2021).

¹¹ T.S., *id.*; *see also* T.J., Docket No. 14-1854 (issued February 3, 2015); *Yvette N. Davis*, 55 ECAB 475 (2004).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 30, 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: September 29, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board