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W.B., Appellant)	
)	
and)	Docket No. 25-0441
)	Issued: May 23, 2025
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, FEDERAL AIR MARSHAL)	
SERVICE, Egg Harbor Township, NJ, Employer)	
)	

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 March 28, 2025 appellant, through counsel, filed a timely appeal from a March 17, 2025 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 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.*

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 January 31, 2024 appellant, then a 47-year-old retired senior federal air marshal, filed an occupational disease claim (Form CA-2) alleging that he developed pulmonary conditions due to factors of his federal employment, including travel and exposure to extreme cold weather. He noted that he first became aware of his condition on February 4, 2021, and realized its relationship to his federal employment on January 29, 2024. Appellant stopped work on February 4, 2021.

In support of his claim, appellant submitted a narrative statement, wherein he explained that he developed a cough in December 2020 when he traveled, while on a temporary-duty assignment, to Los Angeles, California to appear in a training video. He then returned to his normal duties at the employing establishment's training center in Atlantic City, New Jersey, which included COVID-19 temperature checks for visitors to the center. Then, in February 2021, appellant participated in a close-quarters combat training class at an unheated location during a severe winter storm. He related that his cough worsened and was followed by an onset of left-sided chest pain on February 4, 2021, so he went to the emergency room where he was diagnosed with pneumonia and other pulmonary conditions. Appellant related that he believed that he was infected during his trip to Los Angeles and that his subsequent exposure to extreme cold worsened his condition. He also related that he underwent multiple surgeries and became depressed.

In a narrative medical report dated January 29, 2024, Dr. John C. Kucharczuk, a Board-certified thoracic and cardiac surgeon, noted that he first treated appellant when he was admitted to the hospital on March 11, 2021 for a cough which produced 12 ounces per day of green-yellow, occasionally bloody, sputum for three months; sharp left-sided chest pain which radiated to his back and shoulder; and shortness of breath (SOB) after minimal exertion. He noted that he attributed his symptoms to extensive travel as a federal air marshal from December 2020 through February 2021. Dr. Kucharczuk indicated that appellant underwent thoracentesis on March 9, 2021, which showed grossly purulent fluid, and a computerized tomography (CT) scan of the chest, which was consistent with empyema, associated compressive atelectasis, small left upper lobe centrilobular nodules, and bronchial wall thickening. On March 18, 2021, he performed left thoroscopic decortication and removal of lap band for persistent dilated esophagus. Dr. Kucharczuk noted that appellant received extensive intravenous antibiotics and was discharged on March 24, 2021 with two chest tubes in place. He found that he was unable to perform his duties as an air marshal as of July 2021 because of persistent SOB. Dr. Kucharczuk diagnosed empyema, which he opined "developed after pneumonia that he acquired in December/January 2020-2021 with his travel and working conditions."

In a work capacity evaluation for cardiovascular/pulmonary conditions (Form OWCP-5b) dated January 30, 2024, Dr. Kucharczuk opined that appellant was totally disabled due to empyema and SOB.

In a March 19, 2024 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a

questionnaire for his completion. OWCP afforded appellant 60 days to respond. In a separate letter of even date, it requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor. OWCP afforded the employing establishment 30 days to respond.

In a March 21, 2024 agency response, the employing establishment indicated that appellant had retired, and that it did not have any medical records or information regarding his claim.

In a May 15, 2024 response to OWCP's development questionnaire, appellant reiterated that his symptoms developed when he traveled for work in December 2020 and worsened while training in extreme cold in February 2021. He also noted that his job duties involved exposure to substances and fumes associated with cleaning and using firearms and close contact with coworkers and visitors who traveled from around the world. Appellant indicated that he permanently lost part of his lung function and experienced daily SOB. He denied any prior pulmonary condition and indicated that he had quit smoking 20 years prior.

By decision dated May 22, 2024, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between appellant's diagnosed conditions and the accepted employment factors. Consequently, it concluded that he had not met the requirements to establish an injury as defined by FECA.

On May 30, 2024, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a June 20, 2024 narrative report in response to OWCP's development letter, Dr. Kucharczuk noted that pneumonia was a common lung infection caused by bacteria, viruses, and fungi in the air and was spread through coughing, sneezing, and breathing. He noted that it was impossible to know which specific exposure caused appellant's pneumonia but that he could determine the time frame, various activities, and continued exposures that caused the pneumonia to worsen. Dr. Kucharczuk opined that his exposure to coworkers and visitors from December 13 to 17, 2020 contributed to the development of an infection that led to pneumonia, as evidenced by the onset of a cough, which worsened due to exposure to cold air in February 2021 and led to empyema. He explained that it was common for people traveling by air to develop pulmonary infections, and that breathing in cold air worsened respiratory issues. Dr. Kucharczuk noted that cold weather and wet conditions make it easier for bacteria and viruses to grow and lead to excessive mucus production which traps bacteria and viruses. He also explained that cold air irritates the lungs and triggers a cough reflex, which worsens respiratory issues.

OWCP also received hospital records dated March 11, 2021 through February 6, 2024 and a February 7, 2024 progress note by Dr. Kucharczuk, which indicated treatment of empyema. It also received records dated December 27, 2022 through February 22, 2023 pertaining to gastric bypass surgery.

A hearing was held on September 6, 2024. The hearing representative held the record open for 30 days for submission of additional evidence.

OWCP thereafter received a March 29, 2023 narrative report by Dr. Gianni Pirelli, a Board-certified forensic psychologist, who diagnosed appellant with anxiety due to unexpected

medical problems. Dr. Pirelli opined, however, that he was psychologically and behaviorally stable with respect to use of a firearm.

In a September 18, 2024 statement, appellant indicated that Dr. Kucharczuk made him aware that his condition was caused or aggravated by his employment on January 31, 2024. He related that he notified his supervisor of his condition on February 4, 2021, the date that he was hospitalized. Appellant noted that he was considered to be on duty from when he arrived at the airport, through the flights. He also noted that he believed he developed depression and anxiety due to his physical injuries.

By decision dated November 20, 2024, OWCP's hearing representative affirmed OWCP's May 22, 2024 decision, as modified to find that appellant had not met his burden of proof to establish an injury in the performance of duty, as alleged.

On February 24, 2025, appellant, through counsel, requested reconsideration of OWCP's November 20, 2024 decision.

By decision dated March 17, 2025, OWCP denied modification of its November 20, 2024 decision. It found that the evidence of record was insufficient to establish that the injury arose during the course of employment and within the scope of compensable work factors because appellant had not specified employment factors or described a specific work-related incident/exposure affecting a diagnosed medical condition.

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

³ *Supra* note 1.

⁴ *F.H.*, Docket No.18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *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).

compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is casually related to the identified employment factors.⁷

An employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.⁸ Moreover, an injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁹ An employee has not met his or her burden of proof establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.¹⁰ Circumstances such as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statement in determining whether a *prima facie* case has been established.¹¹

ANALYSIS

The Board finds that appellant has met his burden of proof to establish that the employment factors occurred in the performance duty, as alleged.

On his Form CA-2, appellant alleged that he developed pulmonary conditions due to factors of his federal employment. In statements received by OWCP on January 31, May 15, and September 19, 2024, he specifically described employment factors of exposure to contagious passengers, airline staff, visitors, and fellow employees during employment-related air travel in December 2020, and a worsening of his condition due to exposure to extreme cold during close quarters combat training, beginning February 1, 2021. Appellant also submitted two detailed narrative reports by his attending surgeon Dr. Kucharczuk, who opined that exposure to coworkers and visitors from December 13 to 17, 2020 contributed to the development of an infection that led to pneumonia, and that his exposure to cold temperatures in February 2021 contributed to the worsening of his pneumonia which led to empyema.

As there are no inconsistencies sufficient that cast serious doubt on the type of duties he alleged that he performed, the Board finds that appellant has established the implicated factors of his federal employment.¹²

⁷ *S.R.*, Docket No. 24-0839 (issued October 30, 2024); *T.W.*, Docket No. 20-0767 (issued January 13, 2021); *L.D.*, Docket No. 19-1301 (issued January 29, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019).

⁸ *A.C.*, Docket No. 18-1567 (issued April 9, 2019); *D.B.*, 58 ECAB 529 (2007); *Gregory J. Reser*, 57 ECAB 277 (2005).

⁹ *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991); *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

¹⁰ *P.A.*, Docket No. 19-1036 (issued November 19, 2019); *D.B.*, 58 ECAB 464 (2007).

¹¹ *M.C.*, Docket No. 18-1278 (issued March 7, 2019); *Betty J. Smith*, 54 ECAB 174 (2002).

¹² *Id.*; see also *W.S.*, Docket No. 23-0585 (issued June 17, 2024); *I.J.*, Docket No. 20-0599 (issued November 22, 2022).

As appellant has established that the employment exposure occurred in the performance of duty as alleged, the question becomes whether the employment exposure caused an injury.¹³ Therefore, the case shall be remanded to OWCP to determine whether appellant sustained an injury causally related to the accepted employment exposure.¹⁴ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that the employment factors occurred in the performance of duty, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2025 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further development consistent with this decision of the Board.

Issued: May 23, 2025
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

¹³ *D.F.*, Docket No. 21-0825 (issued February 17, 2022); *M.A.*, Docket No. 19-0616 (issued April 10, 2020); *C.M.*, Docket No. 19-0009 (issued May 24, 2019).

¹⁴ *I.J.*, *supra* note 12; *T.M.*, Docket No. 20-0712 (issued November 10, 2020); *see also T.A.*, Docket No. 19-1525 (issued March 4, 2020).