

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

W.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Albany, NY, Employer**

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**Docket No. 06-1395
Issued: December 8, 2006**

Appearances:
Katherine Smith, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 31, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' May 31, 2005 merit decision denying his occupational disease claim and March 26, 2006 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant sustained an occupational injury in the performance of duty; and (2) whether the Office properly denied his request for a review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 14, 2003 appellant, a 49-year-old mail processing clerk, filed an occupational disease claim alleging that he experienced lightheadedness and was unable to function normally as a result of exposure to his workplace environment. In a February 28, 2003 narrative

statement, appellant alleged that the air he breathed on a daily basis was filled with dust, irritating particles and allergens. He stated that the employing establishment had turned off the ventilation system and dust filters, eliminating any removal of dust or contaminants. Appellant indicated that his condition worsened when he was at work and improved when he left the workplace.

On March 27, 2003 the Office notified appellant that the evidence submitted was insufficient to establish his claim. The Office advised him to submit within 30 days a medical narrative from his treating physician which contained a diagnosis and a rationalized opinion as to the cause of his condition.

Appellant submitted medical reports, treatment notes and work excuses from Dr. Richard A. Rubin, a Board-certified internist, who treated appellant for complaints of vertigo and congested sinuses. In notes dated May 23, June 3, August 3, 5 and 20, 2002, Dr. Rubin stated that he was unable to determine the cause of appellant's condition. On November 15, 2002 Dr. Rubin noted that appellant's symptoms occurred mostly at work and stated that his symptoms sounded "allergy related." On December 5, 2002 Dr. Rubin stated that appellant was temporarily disabled by vertigo, "which [was] exacerbated in the workplace." In a March 19, 2003 narrative report, Dr. Rubin stated that he had been treating appellant for complaints of lightheadedness since May 2002. He reported that testing and treatment by a cardiologist and two ear, nose and throat physicians had not revealed a clear etiology for the vertigo. Dr. Rubin noted that appellant's symptoms improved when he was removed from the work environment and opined that he could not continue in his current work situation without some improvement in his condition.

Appellant submitted reports from Dr Gavin Setzen, a Board-certified otolaryngologist. In a November 15, 2002 letter to Dr. Rubin, Dr. Setzen diagnosed chronic allergic rhinosinusitis and nasal obstruction due to a right nasal septal deviation and bilateral inferior turbinate hypertrophy. He indicated that appellant had probable asymmetric right hearing loss and Eustachian tube dysfunction, together with labyrinthine dysfunction, resulting in dizziness, disequilibrium and vertigo. Dr. Setzen also concluded that appellant had multilevel airway obstruction with uvulopalatal redundancy. He recommended further testing to determine the cause of appellant's conditions. Dr. Setzen stated that, if the paranasal computerized tomography scans were "clean," then appellant's symptoms were likely allergic. In his November 19, 2002 report, Dr. Setzen reiterated the above diagnoses. Noting that appellant had significant exposure to dust, dust mites and mold at work, he suggested vestibular rehabilitation. On February 20, 2003 Dr. Setzen indicated that appellant's allergy symptoms had improved when he was off work for 11 weeks. He noted that appellant had experienced a significant recurrence of his symptoms when he returned to work, where he was exposed to dust and mold. In a March 3, 2003 report, Dr. Setzen opined that appellant's symptoms of nasal congestion, dizziness, disequilibrium and vertigo were caused by inhalant allergy. He further opined that his symptoms were probably due to mold, dust and mite exposure at work.

Appellant was also treated by Dr. Scott Osur, a Board-certified allergist and immunologist. On February 25, 2003 Dr. Osur provided diagnoses of rhinitis with nasal congestion, sinus fullness, eye irritation and dizziness. He related appellant's complaint that his

symptoms did not occur at home or when he is on vacation, but were exacerbated within a couple of hours of returning to work. Dr. Osur stated that appellant “may certainly have” a vasomotor component to his symptoms in which particulate matter, exposure from dust particles at work, or other noxious fumes may aggravate nasal symptoms on an irritative, rather than allergic, basis. In a March 6, 2003 report, Dr. Osur opined that there was a correlation between appellant’s workplace exposure and his increased symptoms of nasal congestion and dizziness. After conducting a complete allergy evaluation, he stated that appellant was allergic to pollen and dust mites. Dr. Osur also indicated that there was a vasomotor component to his symptoms, in which irritants that are airborne in the workplace may further aggravate nasal complaints. In a March 25, 2003 letter to Dr. Rubin, Dr. Osur opined that appellant had a combination of allergic and nonallergic rhinitis that was clearly exacerbated by returning to his work environment.

By letter dated March 25, 2003 from Dr. Richard Stevens, the employing establishment controverted appellant’s claim.¹ After reviewing the evidence submitted, Dr. Stevens contended that appellant had failed to establish that his condition was causally related to the workplace environment. He also alleged that the workplace environment was free of dust and irritants, due to the cleaning practices utilized by the employing establishment.

Appellant submitted a Step 3 grievance appeal form which alleged that on April 18, 2002 the employing establishment ceased utilization of the air filtration system in violation of the collective bargaining agreement.

The record contains an Air Quality Monitoring Report of services performed on April 17, 2003 by Adirondack Environmental Services, Inc. The purpose of the report was to assess the general environmental conditions in the optical character reader mail sorting machine area. The scope of the testing included monitoring carbon dioxide, carbon monoxide, temperature, humidity and airborne particulate levels in the area. The report reflected that peak dust levels were well below the Occupational Safety and Health Administration’s (OSHA) regulated limits of exposure. The report also reflected that local area dust collecting units located above the feeder station were not in operation.

By decision dated June 12, 2003, the Office denied appellant’s claim on the grounds that the medical evidence failed to establish that his diagnosed condition was causally related to exposure in the workplace.

In an April 29, 2003 letter to Dr. Osur, Dr. Stevens addressed the results of the Air Quality Monitoring Report. He noted that relative humidity was within normal limits; carbon dioxide and carbon monoxide levels were well within OSHA allowable limits; and mean levels for respirable and total particulate matter were substantially less than the OSHA regulation allows. The Office forwarded copies of the Air Quality Monitoring Report and Dr. Stevens’ April 29, 2003 letter to Dr. Rubin for his review and opinion regarding the etiology of appellant’s condition. On June 12, 2003 Dr. Rubin indicated that appellant was not able to return to work based on the results of the air quality testing. He stated that, regardless of the air quality

¹ The Board notes that Dr. Stevens’ credentials cannot be verified.

test results, appellant's condition was clearly exacerbated by his work environment, based on repeated trials of absence and return to work.

On July 7, 2003 appellant, through his representative, requested an oral hearing. In support of the request, appellant submitted a letter dated March 11, 2004 from the union president, Joseph Hardin, who stated that 40 employees had informed him that they had experienced symptoms of lightheadedness, dizziness, sinus congestion, headaches, asthma or allergies as a result of dust or poor air quality in the work environment. Mr. Hardin also noted that numerous grievances had been filed on this subject. The June 10, 2003 minutes from a Joint Labor/Management Safety and Health Committee Meeting reflected a debate on the issue of whether or not to turn on the air filtration system, which had been turned off due to an anthrax threat. The minutes of an August 12, 2003 union meeting reflected discussion of high and low-level dusting and testing for samples of mold and other allergens in the workplace.

At the March 15, 2004 hearing, appellant testified that the employing establishment shut down the air ventilation systems during the anthrax scare following September 11, 2001. Since that time, "dust just accumulate[d] everywhere." Appellant stated that he did not experience symptoms outside of the workplace, but that within one-half hour inside of the employing establishment's building, he was sweating and felt off-balance. He testified that there was excessive dust in his workplace, which was likely made worse by the low humidity. Appellant's representative contended that appellant's allergies preexisted his employment at the employing establishment. His condition was allegedly exacerbated when the air filtration system was turned off. The hearing representative advised appellant and his representative that the record would remain open for 30 days for the presentation of additional evidence.

On April 13, 2004 the employing establishment responded to representations made and testimony given by appellant at the oral hearing. Dr. Stevens, who was present at the hearing, stated that in 2001 the employing establishment replaced standard vacuums with HEPA vacuums, which do not allow the escape of dust during cleaning. Thus, there is no need for filtration devices. He stated that dust levels at the employing establishment were less than in most homes. Dr. Stevens contended that the medical evidence failed to establish that appellant's condition was caused or aggravated by his employment. He noted that there was no evidence that any of appellant's physicians had visited the employing establishment; that none of the doctors had argued that the test results were in error; and that the only source that the work environment contained levels of irritants or allergens sufficient to cause nasal, sinus and dizziness symptoms, was appellant. On February 26, 2004 Gary Cooper, a union steward, stated that employees had previously developed respiratory problems believed to have been caused by poor air quality at the employing establishment.

In a report dated August 26, 2003, Dr. Osur opined that appellant's nasal symptoms, sinus symptoms and headaches were aggravated by his work environment, as his symptoms increased within several hours of exposure. He stated that there may be increased levels of particulate matter in appellant's direct workstation that have not been accurately measured, and that low ambient humidity levels could contribute to his complaints. Dr. Osur provided diagnoses of allergic rhinitis. He further indicated that appellant likely has a significant amount

of vasomotor rhinitis, which may be aggravated by dust particles, strong odors and other irritants.

In post-hearing memoranda dated April 14 and 27, 2004, appellant's representative contended that the issue was not whether dust levels at the employing establishment were permissible under OSHA, but whether dust was present and aggravated appellant's condition. In a February 24, 2004 statement, coworker, Jay Glenn, noted that he experienced headaches, dizziness and breathing problems as a result of dust and poor air quality at the employing establishment. He also confirmed that the employing establishment had shut off the air filtration units.

By decision dated June 14, 2004, the Office hearing representative affirmed the Office's denial of appellant's claim. The representative found that there was no well-reasoned medical opinion explaining how appellant's condition was related to his work environment. He also found that there was no definite diagnosis related to specific occupational factors.

On March 2, 2005 appellant, through his representative, requested reconsideration of the hearing representative's June 14, 2004 decision. In support of the request, appellant submitted an August 16, 2004 report from Dr. Osur. After reviewing the April 2003 air quality study, Dr. Osur opined that the 12 percent average relative humidity in appellant's work area was below optimal levels and contributed to his respiratory symptoms. Appellant submitted a February 24, 2003 memorandum, entitled "Reiteration of Existing OSHA Policy on Indoor Air Quality: Office Temperature/Humidity and Environmental Tobacco Smoke." In pertinent part, the memorandum provided: "OSHA recommends temperature control in the range of 68 to 76 degrees F and humidity control in the range of 20 percent to 60 percent."

By decision dated May 31, 2005, the Office denied modification of the hearing representative's June 14, 2004 decision. The Office accepted as established that there was low humidity and dust in the work environment. However, the Office found that the medical evidence was not well rationalized and did not support a causal link between established work factors and a diagnosed medical condition.

On February 16, 2006 appellant's representative again requested reconsideration, contending that the Office had an affirmative obligation to develop the medical evidence where a *prima facie* case exists. In support of the request, appellant submitted a copy of Dr. Osur's August 16, 2004 report. In a November 21, 2005 report, Dr. Osur stated that appellant had evidence of perennial allergic rhinitis, plus a significant component of vasomotor rhinitis in which irritants such as dust and other particulate matter may irritate nasal symptoms on an irritative rather than allergic basis. He also explained that dry, ambient humidity in a work environment may dry mucous membranes. The increased osmolality in the mucous membrane layer can result in irritation of the afferent nerve endings, causing reflux, increase in nasal discharge, nasal congestion, and associated headache and dizziness. The increased osmolality may also, in and of itself, trigger the release of a cascade of allergic chemicals further aggravating nasal symptoms.

By decision dated March 26, 2006, the Office denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant merit review.

LEGAL PRECEDENT

A claimant seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence, including that any specific condition or disability for work for which he claims compensation is causally related to the employment injury.³ In an occupational disease claim, to establish that an injury was sustained in the performance of duty, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁴

ANALYSIS

The Board finds that the case is not in posture for decision regarding whether the employee sustained an injury in the performance of duty.

An employee who claims benefits under the Act has the burden of establishing the essential elements of his or her claim. The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment. As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.⁵ However, it is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to

² 5 U.S.C. § 8101 *et seq.*

³ 20 C.F.R. § 10.115(e), (f) (1999). *See Gary M. DeLeo*, 56 ECAB ___ (Docket No. 05-1099, issued August 8, 2005). *See also Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996). Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors must be based on a complete factual and medical background of the claimant. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

⁴ *Victor J. Woodhams*, *supra* note 3.

⁵ *See Virginia Richard, claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); *see also Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

compensation, the Office shares responsibility in the development of the evidence to see that justice is done.⁶

The Office accepted that there was low humidity and dust in appellant's work environment, but found that the medical evidence did not support a causal relationship between established work factors and a diagnosed condition. Dr. Rubin treated appellant for complaints of vertigo and congested sinuses and opined that his condition was clearly exacerbated by his work environment, based on repeated trials of absence and return to work. Dr. Setzen diagnosed chronic allergic rhinosinusitis and opined that appellant's symptoms were caused by mold, dust and mite exposure at work. Dr. Osur provided a diagnosis of perennial allergic rhinitis, with a significant component of vasomotor rhinitis, in which irritants such as dust and other particulate matter can irritate nasal symptoms on an irritative rather than allergic basis. Dr. Osur also concluded that the below average relative humidity in appellant's work area, contributed to his respiratory symptoms. Noting that his symptoms increased within several hours of returning to work, he opined that appellant's condition was exacerbated by his work environment.

The record contains several reports from the employing establishment's physician, Dr. Stevens, who contended that appellant had failed to establish that his condition was caused by factors of his employment. Dr. Stevens' reports lack probative value for several reasons. It is unclear whether he is a medical doctor, as his credentials cannot be verified, Dr. Stevens does not qualify as a "physician" under the Act.⁷ Dr. Stevens did not examine appellant, nor did he support his opinion with medical rationale. Rather, his reports serve merely to advocate the position of the employing establishment.

The Board notes that, while none of the reports of appellant's attending physicians are completely rationalized, they are consistent in indicating that the employee sustained an employment-related condition and are not contradicted by any substantial medical or factual evidence of record. Therefore, while the reports are not sufficient to meet appellant's burden of proof to establish his claim, they raise an uncontroverted inference between appellant's claimed condition and the accepted employment factors and are sufficient to require the Office to further develop the medical evidence and the case record.⁸

On remand the Office should prepare a statement of accepted facts and refer appellant, along with his medical records, for a second opinion examination, in order to obtain a rationalized opinion as to whether appellant's current condition is causally related to factors of his employment, either directly, or through aggravation, precipitation or acceleration.

⁶ See *Virginia Richard*, *supra* note 5; see also *Phillip L. Barnes*, 55 ECAB 426 (2004); *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1983).

⁷ Section 8101(2) of the Act 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." See *Merton J. Sills*, 39 ECAB 572, 575 (1988).

⁸ See *Virginia Richard*, *supra* note 5; see also *Robert A. Redmond*, 40 ECAB 796, 801 (1989); *John J. Carlone*, 40 ECAB 354 (1998).

CONCLUSION

The Board finds that this case is not in posture for decision as to whether or not appellant sustained an injury in the performance of duty. In light of the Board's ruling on the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action by the Office consistent with this decision.

Issued: December 8, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board