United States Department of Labor
Employees' Compensation Appeals Board

S.R., Appellant	)	
and	)	**Docket No. 10-2001**
	)	**Issued: June 7, 2011**
DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, Orlando, FL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 3, 2010 appellant filed a timely appeal of the June 22, 2010 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has met her burden of proof in establishing that she developed an occupational disease in the performance of duty.

FACTUAL HISTORY

On October 6, 2009 appellant, then a 47-year-old air marshal, filed an occupational disease claim, alleging that she was exposed to a variety of airborne germs and disease while

[1] 5 U.S.C. §§ 8101-8193.

traveling on airplanes that worsened her bronchitis, sinus and ear infections and colds. She became aware of her condition and realized it was caused by her employment on December 1, 2006. Appellant resigned on December 27, 2006.

In an October 9, 2009 letter, the Office advised appellant of the type of evidence needed to establish her claim. It particularly requested that she submit a physician's reasoned opinion addressing the relationship of her claimed condition and specific work factors.

In an undated statement, appellant noted that she worked for the employing establishment from 2002 to 2006 and flew 40 to 60 hours per week. She was unaware of documented episodes of passenger sicknesses on flights but noted numerous times where passengers coughed and sneezed. Appellant noted that shortly after a continuous flight schedule she noticed being sick with upper respiratory infections, ear infections and chronic bronchitis. She reported undergoing a lobectomy in 2004 due to cancer. Appellant indicated that she did not have a pulmonary condition prior to her current employment but noted having allergies to mold in airplane air conditioning vents and carpet and room deodorizers in hotels. She indicated that while on overnight missions she would leave hotels with sinus drainage which would lead to bronchitis. Appellant noted smoking one pack per day of cigarettes for 10 years and quit in 2004 after lung surgery.

Appellant submitted a June 13, 2001 operative report from Scott A. Nadenik, an osteopath, who performed a direct laryngoscopy and diagnosed T1 squamous cell carcinoma of the left lateral tongue, suspect second primary site. On October 20, 2004 Dr. Nadenik performed a direct laryngoscopy with biopsy of the right tongue base and diagnosed right cervical ademitis with possible right vallecula mass. Appellant submitted a March 4, 2003 operative report from Dr. David E. Lammermeir, a Board-certified surgeon, who performed a right thoracotomy and right upper and right middle lobectomy and diagnosed nonsmall cell carcinoma of the right upper lobe.

Appellant was treated by Dr. Hany Falestiny, a Board-certified pulmonologist, from August 2, 2002 to September 27, 2005, who noted that appellant was status post lobectomy, radical tonsillectomy of squamous cell cancer with a history of tobacco use. On November 8, 2004 Dr. Falestiny indicated that a biopsy of a lymph node revealed squamous cell cancer for which appellant underwent radiation and chemotherapy. She noted that appellant stopped smoking and continued to work. On February 8 and March 10, 2005 Dr. Falestiny diagnosed bilateral pneumonia, recurrent laryngeal cancer, dysphagia, tobacco abuse, status post right upper and right middle lobectomy for cancer, intermittent bronchitis, tonsillectomy for carcinoma and recurrent head and neck cancer. She noted that appellant smoked six to eight cigarettes per day and recently quit. On June 7, 2005 Dr. Falestiny noted that appellant exercised five days a week for her job as an air marshal. She indicated that appellant could return to work as an air marshal but recommended that she change jobs to one that was less stressful and with less exposure to airborne diseases that would cause upper respiratory infections. In a September 27, 2005 report, Dr. Falestiny diagnosed chronic obstruction pulmonary disease. On November 3, 2006 she noted that appellant no longer had the physical strength and endurance required for the practical exercise performance test for her job due to chronic obstructive pulmonary disease and her history of lung and tonsil cancer. In an August 19, 2009 report, Dr. Falestiny diagnosed chronic obstructive pulmonary disease and history of right lung cancer and recommended that appellant

not return to her air marshal position due to her diagnosed conditions. Also submitted was a September 20, 2005 computed tomography (CT) scan, which revealed prominence at the base of the tongue and in the pharynx and a October 30, 2006 CT scan, which revealed asymmetric soft tissue density along the right soft palate. Appellant underwent a positron emission tomography (PET) scan, on March 30, 2006 that showed evidence of locally recurrent or metastatic right tonsillar or right upper lobe pulmonary carcinoma. A December 13, 2006 magnetic resonance imaging (MRI) scan of the head and neck revealed no abnormalities.

On December 14, 2009 the Office requested clarification from appellant and inquired as to whether there was documented evidence of the presence of mold in airplane air conditioning vents. It further requested that she address whether she reported her allergy and pulmonary reaction to hotel room deodorizers to her supervisor. The Office requested appellant's smoking history and medical records for her diagnosed coronary pulmonary disease and lung, tongue and laryngeal cancers. In an undated letter, appellant indicated that she was unaware of any documented cases of mold on aircraft vents but she saw what appeared to be mold or dirt on air vents in different aircraft and reported this to her supervisor. She stated that she did not report her allergic reactions to room deodorizers. Appellant noted smoking 10 to 12 years and quitting in 2004.

The employing establishment submitted a January 6, 2010 statement from Lauren Cannon, a workers' compensation case manager, who indicated there was no documentation of mold or other airborne particulates reported to airlines by its employees. Ms. Cannon noted that appellant would have boarded two to three aircraft a day and there were no reports by appellant to her supervisor regarding exposure to airborne particulates. She noted that appellant reported medical conditions of cancer and chronic obstructive pulmonary disease. Ms. Cannon noted that appellant resigned due to personal medical reasons. The employer submitted a job description for a federal air marshal and a January 7, 2010 statement from appellant's former supervisor, Daniel Goodwin, denying that he had any recollection of appellant communicating to him that she had respiratory problems due to mold or air freshener on aircraft.

In a decision dated January 19, 2010, the Office denied appellant's claim. It found that the evidence did not document the presence of mold or other airborne particulates in the aircrafts on which she worked. The Office also found that the medical evidence did not support that appellant's current medical conditions was causally related to workplace exposure.

On January 25, 2010 appellant requested a telephonic oral hearing which was held on April 6, 2010. She submitted reports from Dr. Nadenik dated January 21, 2002 to October 4, 2005, who noted that appellant was making stable progress post tongue and neck surgery with no evidence of recurrence. Dr. Nadenik diagnosed sinusitis, chronic rhinitis and allergies and referred appellant for a PET scan. In reports dated March 15 to October 4, 2005, he noted that she was status post radiation and chemotherapy and was doing well. Dr. Nadenik treated appellant on April 13, 2010 and noted that between 2002 and 2005 he treated her for head and neck cancer, sinusitis, upper respiratory infections, eustachian tube dysfunction and ear fluid issues. A June 3, 2004 report from Dr. John P. Nardandrea, a Board-certified family practitioner, diagnosed allergies and low grade bronchitis. In May 8 and September 26, 2006 reports, Dr. Falestiny treated appellant for breathing problems and congestion. She reported smoking one cigarette a month. Dr. Falestiny diagnosed history of bilateral pneumonia, lung masses,

recurrent laryngeal cancer, tobacco abuse and status post radical tonsillectomy for cancer. She recommended appellant stop smoking. On March 17, 2010 appellant was treated by Dr. Steve Busy, a Board-certified oncologist, who noted that since 2001 she was diagnosed with four primary cancers of the left tonsil/soft palate, left tongue, the upper lobe of the right lung and right lymph node. Dr. Busy treated appellant for repeated bouts of bronchitis due to decreased lung capacity and opined that flying as an air marshal in a pressured cabin carried increased difficulties and recommended appellant change professions. Also provided was a statement from Daniel Lynn, a coworker, who noted that appellant had repeated sinus infections and he saw what appeared to be mold on aircraft vents; however, he did not report the issue to his supervisor. In an April 7, 2010 statement, Bonnie Rodgers, appellant's babysitter, noted that appellant had repeated bouts of bronchitis which appellant attributed to mold in the aircrafts and room deodorizers.

In a June 22, 2010 decision, a hearing representative affirmed the January 19, 2010 Office decision.

LEGAL PRECEDENT

An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his claim. When an employee claims that she sustained an injury in the performance of duty, she must submit sufficient evidence to establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. Appellant must also establish that such event, incident or exposure caused an injury.[2]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, 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) 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 employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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.[3]

[2] *See generally John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989); *see Walter D. Morehead*, 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury).

[3] *Solomon Polen*, 51 ECAB 341 (2000).

ANALYSIS

The Board finds that appellant has not established that her bronchitis, sinus and ear infections and colds were caused by her employment.

Appellant claimed that her conditions were causally related to her occupational exposure to a variety of airborne germs and disease while performing her duties as an air marshal on aircraft. From 2002 to 2006, she worked as an air marshal and was deployed worldwide on passenger flights. However, appellant did not submit sufficient evidence that she was, in fact, exposed to particular substances at work. Her statements did not identify specific times or particular aircraft on which she was exposed to mold or other particular airborne irritants. Nor is there any record of contemporaneous complaints made by appellant of such exposure. A statement from a coworker, Mr. Lynn, asserted that he saw what appeared to be mold on aircraft vents but noted that he did not notify his supervisor. He also did not specify the time or the aircraft on which he may have seen mold. The record does not support appellant's exposure to airborne particles including mold and deodorizers while performing her job functions. In a January 6, 2010 statement, Ms. Cannon of the employing establishment, stated that there were no documented reports of mold or any other airborne particulates by employing establishment employees. She noted that appellant would have boarded two to three aircraft a day and there were no reports by appellant to her supervisor regarding exposure to airborne particulates.[4] Ms. Cannon noted there was no exposure data for the employee's jobs as persons in such jobs were not exposed to contaminants such as mold or airborne germs. She noted that appellant reported medical conditions of cancer and chronic obstructive pulmonary disease and resigned due to personal medical reasons.

The weight of the factual evidence, therefore, does not support exposure to mold and air deodorizers. The factual evidence does not substantiate that appellant was exposed to particular airborne germs or contaminants. Appellant also asserted that she was exposed to a variety of airborne germs and diseases. To the extent that she generally alleged that her exposure to the air on airplanes caused or aggravated her claimed conditions, the Board finds that the medical evidence is insufficient to establish her claim.

Appellant did not submit rationalized medical evidence based on an accurate history supporting that any established work factors or exposures caused or contributed to her bronchitis, sinus and ear infections and colds. In a June 7, 2005 report, Dr. Falestiny noted that appellant could return to work as an air marshal but recommended that she change jobs to one that was less stressful and with less exposure to airborne diseases that would cause upper respiratory infections. Similarly, in reports dated September 27, 2005 to September 19, 2009, she diagnosed chronic obstruction pulmonary disease and noted that appellant no longer had the capacity for the physical strength and endurance required for her employment due to chronic obstructive pulmonary disease and her history of lung and tonsil cancer. However, Dr. Falestiny did not specifically opine that a particular diagnosed condition was caused or aggravated by a particular workplace exposure. She did not provide a rationalized opinion explaining why the diagnosed

[4] Mr. Goodwin, appellant's former supervisor, advised that appellant made no complaints of respiratory problems due to mold or air fresheners.

upper respiratory infections were caused by "exposure to airborne diseases" and why the diagnosed respiratory infections would not be due to appellant's diagnosed chronic obstructive pulmonary disease, her already compromised respiratory system due to lung and laryngeal cancers and her history of tobacco abuse.[5] The need for medical reasoning or rationale, is particularly important in a case such as this where appellant has a multiple preexisting conditions, in addition to a history of smoking, involving or affecting the respiratory system. Therefore, the opinion of Dr. Falestiny is insufficiently rationalized to meet appellant's burden of proof.

In a March 17, 2010 report, Dr. Busy stated that since 2001 appellant had primary cancers of the left tonsil/soft palate, left tongue, the upper lobe of the right lung and right lymph node. He noted that she had repeated bouts of bronchitis due to decreased lung capacity and opined that flying as an air marshal in a pressured cabin carried increased difficulties. However, Dr. Busy failed to provide a rationalized opinion explaining why the diagnosed bronchitis was caused by employment factors of working in "pressured cabin" and why such condition would not be due to appellant's diagnosed decreased lung capacity and compromised respiratory system due to lung and laryngeal cancers and history of tobacco abuse.[6]

Other reports from Dr. Nadenik dated June 13, 2001 to April 13, 2010, noted appellant's treatment but did not specifically address whether any particular employment factors or exposures caused or contributed to her sinusitis or respiratory infections. As Dr. Nadenik did not address whether the employee's work contributed to her diagnosed sinusitis or upper respiratory infections, his reports are of limited probative value.[7]

Other medical reports and diagnostic testing including a March 4, 2003 report from Dr. Lammermeir, CT scans dated September 20 and October 2005, a PET scan dated March 30, 2006, a December 13, 2006 MRI scan and a June 3, 2004 report from Dr. Nardandrea, did not specifically address how established employment factors or exposures caused or contributed to a diagnosed bronchitis, allergies or upper respiratory infections.

Consequently, appellant has not met her burden of proof as the factual evidence does not establish exposure to mold or to specific airborne particulates and the medical evidence does not otherwise establish how exposure to the air on airplanes caused or aggravated a diagnosed medical condition.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that her claimed conditions were causally related to her employment.

[5] *Franklin D. Haislah*, 52 ECAB 457 (2001); *see Jimmie H. Duckett*, 52 ECAB 332 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[6] *Id*.

[7] *A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

ORDER

IT IS HEREBY ORDERED THAT June 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 7, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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