United States Department of Labor
Employees' Compensation Appeals Board

M.V., Appellant	)	
and	)	**Docket No. 11-1503**
	)	**Issued: February 15, 2012**
SOCIAL SECURITY ADMINISTRATION, Ironton, OH, Employer	)	

Appearances:
Rick Hanna, 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 June 14, 2011 appellant, through her representative, filed a timely appeal of the December 28, 2010 decision of the Office of Workers' Compensation Programs (OWCP) which denied her claim for an occupational disease. She also appealed a February 24, 2011 decision which denied her request for an oral hearing as untimely. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof in establishing that she developed an occupational disease in the performance of duty; and (2) whether OWCP properly denied her request for an oral hearing.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On August 30, 2010 appellant, then a 31-year-old social insurance specialist, filed an occupational disease claim alleging that she developed respiratory problems, chronic sinusitis, dizziness, fatigue and diarrhea from working in her employing establishment building. She became aware of her condition on January 2, 2002 and realized it was causally related to her employment on July 30, 2010. Appellant's supervisor, Bette Backus, noted on the Form CA-2, that in June 2009 she noticed loose wall paper seams which covered a black material and air quality tests revealed mold in the walls.

Appellant submitted a statement and indicated that she developed chronic recurring respiratory problems, sinusitis, digestive and vision problems from working in her employing establishment building. She noted that the heating and air conditioning system did not work properly with the temperature varying from one side of the building to another, the vents were filthy, windows and ceilings leaked and there was visual black mold on the walls. Appellant indicated that an air quality test was performed which revealed toxic black mold.

Ms. Backus submitted a statement noting that her employing establishment moved into the current building in 1998 and the heating and air conditioning system did not work properly with varying temperatures, the windows leaked and the wall paper was peeling off. She indicated that testing revealed mold on the walls but not in sufficient amounts to present a health hazard. Ms. Backus indicated that the Public Health Service recommended that abatement be done and the employing establishment took action to contain the mold. She indicated that appellant had a recurring cough and rash on her face but noted that there was no evidence it was due to the mold, rather, she indicated that the Ohio River Valley was known for allergens which may account for the high percentage of absenteeism in the office.

A September 15, 2009 air quality report revealed mold around the wall paper and recommended sealing the areas of wallpaper where mold was visible, developing a mold removal plan and conducting an overall review of the heating and air conditioning system.

On October 8, 2010 OWCP advised appellant of the type of factual and medical evidence needed to establish her claim and requested that she submit such evidence, particularly requesting that she submit a physician's reasoned opinion addressing the relationship of her claimed condition and specific employment factors.

Appellant was treated by several nurse practitioners from December 13, 2006 to July 26, 2008 for high blood pressure, anxiety, panic attacks, hypertension, fatigue, weakness and sinusitis. In reports dated September 4 to December 10, 2008, she presented with multiple joint pain in the groin, hip, knees and ankles and the nurse diagnosed arthralgia and fatigue. From January 10 to November 28, 2009, appellant was treated for headache, sinus pain and pressure with sinus drainage, coughing, syncope and dizziness. A nurse practitioner diagnosed anxiety, hiatal hernia, irritable bowel syndrome, dermatitis, allergic rhinitis, hypertension and dizziness. Other reports dated April 6 to July 3, 2010, noted appellant's treatment for a lumbar condition with the nurse practitioner diagnosing disc disorder of the thoracic region, thoracic sprain, lumbar strain, lumbago with sciatica.

Appellant was treated by Dr. Jeannine Parikh, a Board-certified family practitioner, on May 22, 2006 for fatigue, nausea, abdominal pain and chronic pain. Dr. Parikh diagnosed colitis and hypothyroidism. On June 6, 2006 appellant presented with sinus pressure, congestion and coughing and Dr. Parikh diagnosed sinusitis. Similarly, on November 30 and December 13, 2006 she was treated for cough, chest pain and allergies. In a report dated October 30, 2009, Dr. Parikh diagnosed anxiety, irritable bowel syndrome, herniated discs, dermatitis seborrheica, allergic rhinitis, hypertension and acute respiratory infection. She noted examination revealed fever, fatigue, cough, chest tightness, shortness of breath and wheezing. Likewise, in April 20 and May 25, 2010 reports, Dr. Parikh treated appellant for low back and neck pain and lumbago and diagnosed thoracic and lumbar sprain and strain.

An April 21, 2008 chest x-ray revealed no interval acute process. An October 30, 2008 magnetic resonance imaging (MRI) scan of the lumbar spine revealed disc herniation at L5/S1. A computerized axial tomography scan of the abdomen and pelvis dated February 26, 2009 and a computerized tomography (CT) scan of the head dated December 7, 2009, revealed no abnormalities. Appellant underwent a CT scan of the neck on December 31, 2009 which revealed hypertrophy at the adenoids, platine and tonsils, asymmetry of the right glottic soft tissues and slight hypertrophy.

In a November 22, 2010 inquiry, appellant's senator requested status information on the claim. Accompanying the inquiry were documents from the employing establishment and the General Services Administration addressing the mold issue in the employing establishment building. Appellant submitted information from coworkers who experienced chronic headaches, sinus infections, fatigue, nasal congestion, irritable bowel syndrome which they attributed to the mold problem in their employing establishment building. An August 12, 2010 indoor air quality survey report done on the employing establishment work site recommended sealing the wall paper where mold was visible, determining the extent of the mold in the office, assuring that the ventilation system recommendations were addressed and humidity levels complied with specifications.

On December 28, 2010 OWCP denied appellant's claim on the grounds that the medical evidence did not demonstrate that the claimed medical condition was related to the established work-related events.

In an appeal request form dated January 27, 2011 and postmarked January 28, 2011 appellant requested an oral hearing.

In a decision dated February 24, 2011, OWCP denied appellant's request for an oral hearing. It found that the request was not timely filed. Appellant was informed that her case had been considered in relation to the issues involved, and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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]

ANALYSIS -- ISSUE 1

It is not disputed that appellant worked as a social insurance specialist in a building which contained mold in the work area in which she worked. It is also not disputed that she has been diagnosed with respiratory problems, chronic sinusitis, dizziness, fatigue and diarrhea. However, appellant has not submitted sufficient medical evidence to establish that her diagnosed conditions were causally related to specific employment factors or conditions. She did not submit a rationalized medical report from a physician addressing how specific employment factors may have caused or aggravated her claimed conditions.

Appellant was treated by Dr. Parikh since May 22, 2006 for various symptoms including fatigue, nausea, abdominal pain and chronic pain. Dr. Parikh diagnosed certain conditions including sinusitis, anxiety, irritable bowel syndrome, herniated discs, dermatitis, allergic rhinitis, hypertension and acute upper respiratory infection. However, she did not provide a history of injury[4] noting appellant's mold exposure at work and did not specifically address

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

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

[4] *Frank Luis Rembisz,* 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

whether her diagnosed conditions were caused or aggravated by mold exposure at work.[5] As such, appellant failed to provide a rationalized medical opinion explaining why any condition was causally related to a particular period of mold exposure at work.[6] Therefore, these reports are insufficient to establish her claim.

Similarly, other medical reports, including reports of diagnostic testing, MRI scans and CT scans, are insufficient to establish the claim as they do not specifically address whether particular employment factors caused or contributed to a diagnosed respiratory condition, sinusitis and gastrointestinal conditions. Consequently, the medical evidence is insufficient to establish a causal relationship between specific factors or conditions of employment and the diagnosed medical conditions.

Appellant also submitted treatment notes from nurse practitioners who treated her for various conditions. However, the Board has held that nurses are not physicians and are not competent to render a medical opinion under FECA.[7] Medical documents not signed by a physician are not probative medical evidence and are insufficient to establish appellant's claim.[8]

Appellant also provided articles on black mold. However, the Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and an employee's federal employment as such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee.[9]

On appeal, appellant asserts that sufficient evidence was submitted to support that the diagnosed respiratory problems were work related. As noted above, she did not provide medical evidence from a physician explaining why a particular period of mold exposure at work caused or aggravated a diagnosed medical condition.

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.

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[5] *Jaja K. Asaramo*, 55 ECAB 200 (2004) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

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

[7] *G.G.*, 58 ECAB 389 (2007).

[8] *See* 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. *See also Charley V.B. Harley,* 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

[9] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on her claim before a representative of the Secretary."[10] Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[11] A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.[12] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[13] OWCP's procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).[14]

ANALYSIS -- ISSUE 2

Appellant requested a hearing in an appeal form dated January 27, 2011 and postmarked January 28, 2011. As the hearing request was made more than 30 days after issuance of the December 28, 2010 OWCP decision, her request for an oral hearing was untimely filed and she is not entitled to a hearing as a matter of right. The 30-day time period for determining the timeliness of appellant's hearing request commences on the first day following the issuance of OWCP's decision.[15] As OWCP's decision was issued on December 28, 2010, the 30-day period for requesting a hearing began to run on December 29, 2010 and the last or 30th day was January 27, 2011. Since appellant's hearing request was dated January 28, 2011, it was untimely as it fell on the 31st day after the issuance of OWCP's decision. Accordingly, she was not entitled to a hearing as a matter of right.

OWCP further considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. It has broad administrative discretion in choosing means to achieve its general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and

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[10] 5 U.S.C. § 8124(b)(1).

[11] 20 C.F.R. §§ 10.616, 10.617.

[12] *Id*. at § 10.616(a).

[13] *Eddie Franklin,* 51 ECAB 223 (1999); *Delmont L. Thompson,* 51 ECAB 155 (1999).

[14] *See R.T.*, Docket No. 08-408 (issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record,* Chapter 2.1601.4(b)(3) (October 1992).

[15] *See John B. Montoya*, 43 ECAB 1148, 1151-52 (1992). *See also Donna A. Christley*, 41 ECAB 90, 91 (1989).

probable deductions from established facts.[16] There is no indication that OWCP abused its discretion in this case in finding that appellant could further pursue the matter through the reconsideration process.

Consequently, OWCP properly denied appellant's request for a hearing.

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she developed an employment-related injury in the performance of duty. The Board further finds OWCP properly denied appellant's request for a hearing as untimely.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated February 24, 2011 and December 28, 2010 are affirmed.

Issued: February 15, 2012
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

[16] *Samuel R. Johnson,* 51 ECAB 612 (2000).