



## **FACTUAL HISTORY**

On August 30, 2010 appellant, then a 29-year-old service representative, filed an occupational disease claim alleging that on September 1, 2003 she developed numbness in her legs, dry cough, sore throat, stuffy nose, reoccurring infections immunosuppression, high inflammation, chronic fatigue, aches and pains, chest pain, joint and muscle pain, diarrhea, nausea, headaches, reoccurring cold and influenza-type symptoms due to exposure to stachybotry or black mold in the performance of duty. She stated that she was not aware of the relationship between her condition and her employment until July 30, 2010. Appellant submitted a narrative statement listing her symptoms and stating that until she became aware of the mold at the employing establishment her symptoms were without known cause. She stated that the mold was visible in her workstation, but was being contained with clear tape.

Appellant's district manager, Bette L. Backus submitted a statement noting that the employing establishment building had an inefficient cooling system with two mobile air conditioning units. She stated that the windows were leaky and that in June 2009 wallpaper loosened at the seams. The employing establishment conducted testing and found mold on the exterior facing walls, but not in sufficient quantities to present health hazards. In September 2009, the health inspector found mold present inside the exterior walls on the south and west sides of the building. The health inspector recommended abatement. The employing establishment determined to contain the mold as air testing did not establish mold spores in the heating, ventilation and air conditioning (HVAC) system.

An indoor air quality survey report dated September 25, 2009 noted mold at the corners of windows and on the south and west perimeter walls. A memorandum dated July 7, 2010, noted that the indoor air quality screening taken on September 15, 2009 required action. Required activities were noted for the landlord including sealing areas where the mold was visible, evaluating the cause of the mold, determining the extent of damage to walls, developing a mold removal plan, conducting a review of the HVAC system and adjusting the dampers to ensure adequate outdoor air.

In a letter dated October 8, 2010, OWCP requested evidence substantiating a medically documented and diagnosed work-related injury. Appellant was diagnosed with pharyngitis on September 2, October 13 and December 31, 2004. She submitted medical records regarding migraines and nausea from August 2004. In October 2005 and April 2006, appellant sought treatment for a sore throat. She underwent a laparoscopic cholecystectomy on April 18, 2006. Appellant also submitted hospital records regarding chest pain and right leg numbness on September 24, 2006. On April 19, 2007 she underwent a laparoscopic gastric restriction procedure. Appellant reported to the emergency room on October 15, 2007 and received a diagnosis of meningitis. She experienced abdominal pain on September 29 and October 5, 2008. Appellant was diagnosed with a postspinal headache on April 9, 2009. She underwent a nerve conduction evaluation on May 28, 2009 due to pain and numbness in her legs intermittently. Appellant reported bilateral leg tingling on June 11, 2009. She reported headaches swollen glands and trouble swallowing on September 26, 2009. On November 20, 2009 appellant sought treatment for cough, pharyngitis, fever and generalized body aches. She submitted medical records relating to her gastric banding, generalized abdominal pain and nausea.

Appellant submitted information from the internet regarding toxic black mold symptoms.

In a note dated November 16, 2010, Dr. Tony Virgin, a family practitioner, noted appellant's conditions of chronic sinusitis, pharyngitis, immune system suppression, dry cough, hacking, nose and throat irritation, body aches, chronic fatigue, frequent headaches, nasal and sinus congestion and chest pain. He noted her exposure to black mold at the employing establishment. Dr. Virgin stated, "It is my opinion, of the facts presented that the patient's conditions could be related to black mold."

By decision dated December 28, 2010, OWCP denied appellant's claim on the grounds that she failed to submit the necessary medical opinion evidence to establish a causal relationship between her diagnosed conditions and her employment exposure.

Appellant requested an oral hearing through a form dated January 27, 2011, faxed on January 28, 2011, postmarked on January 31, 2011 and received by OWCP's Branch of Hearings and Review on February 3, 2011.

In a decision dated February 24, 2011, the Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that it was not timely and stated that the issue could equally well be addressed through the reconsideration process.

### **LEGAL PRECEDENT -- ISSUE 1**

OWCP's regulations define an occupational disease as "a condition produced by the work environment over a period longer than a single workday or shift."<sup>2</sup> 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) 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 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 the claimant. The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

Appellant has submitted a medical report from Dr. Virgin diagnosing chronic sinusitis, pharyngitis, immune system suppression, dry cough, hacking, nose and throat irritation, body aches, chronic fatigue, frequent headaches, nasal and sinus congestion and chest pain. She has

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<sup>2</sup> 20 C.F.R. § 10.5(q).

<sup>3</sup> *Lourdes Harris*, 45 ECAB 545, 547 (1994).

also submitted factual evidence that she was exposed to black mold at the employing establishment. Finally, appellant has submitted a statement from Dr. Virgin that her diagnosed conditions could be related to black mold.

The Board finds that appellant has not submitted sufficient medical evidence to establish that her diagnosed conditions are causally related to the employment exposure. The only medical evidence supporting appellant's claim for a causal relationship between her condition and her employment exposure is Dr. Virgin's report. This report is not sufficiently detailed and well reasoned to establish her claim. Dr. Virgin did not provide any medical reasoning to support his conclusion and did not state why he believed that appellant's conditions could be related to her employment exposure. He also stated his opinion in speculative terms, merely noting that her condition could be related to black mold, rather than offering a reasoned statement that her condition was related and explaining his position. The Board finds that the medical evidence is not sufficiently rationalized medical opinion evidence, based upon a complete factual and medical background, to show a causal relationship between the claimed condition and identified exposure.

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.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b) of FECA,<sup>4</sup> concerning a claimant's entitlement to a hearing before an OWCP representative, states: "Before review under section 8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on her claim before a representative of the Secretary."<sup>5</sup>

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.<sup>6</sup> Even where the hearing request is not timely filed, OWCP may within its discretion, grant a hearing and must exercise this discretion.<sup>7</sup>

### **ANALYSIS -- ISSUE 2**

Following the issuance of OWCP's December 28, 2010 decision, appellant had 30 days from the date of issuance of that decision to request an oral hearing before an OWCP hearing representative. The 30-day computation begins with December 29, 2010. Thirty days from December 29, 2010 is January 27, 2011. Because appellant's request was faxed to OWCP's

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Id.* at § 8124(b)(1).

<sup>6</sup> *Tammy J. Kenow*, 44 ECAB 619 (1993).

<sup>7</sup> *Id.*

Branch of Hearings and Review on January 28, 2011, her request was untimely.<sup>8</sup> OWCP, therefore, properly denied her hearing request as a matter of right.

OWCP then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. It determined that a hearing was not necessary as the issue in the case was medical and could be resolved through the submission of medical evidence in the reconsideration process. Therefore, the Board finds that OWCP properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny her request for a hearing as she had other review options available.

### **CONCLUSION**

The Board finds that appellant has not submitted the necessary medical opinion evidence to establish a causal relationship between her diagnosed conditions and her accepted black mold exposure. The Board further finds that OWCP's Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely.

### **ORDER**

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

Issued: February 1, 2012  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>8</sup> The Board notes that as the request for oral hearing was postmarked even later, *i.e.*, January 31, 2011 and received by OWCP's Branch of Hearings and Review subsequent to that date, *i.e.*, February 3, 2011, the request was also untimely based on both, the date of the postmark and the date of receipt.