

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

_____)	
J.C., Appellant)	
)	
and)	Docket No. 20-0943
)	Issued: April 4, 2022
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF PRISONS, FEDERAL)	
CORRECTIONAL INSTITUTION BEAUMONT)	
LOW, Beaumont, TX, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 27, 2020 appellant filed a timely appeal from a March 23, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal and to OWCP following the March 23, 2020 decision. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a medical condition causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On October 15, 2018 appellant, then a 30-year-old correctional officer, filed an occupational disease claim (Form CA-2) alleging that he experienced complications from mold, including shortness of breath, chest tightness, wheezing, coughing, sneezing, a runny and stuffy nose, dry skin, itchy eyes, nose and throat, post nasal drip, and watery eye due to factors of his federal employment, including exposure to severe mold infestations and water leaks. He noted that he first became aware of his conditions and their relationship to his federal employment on September 22, 2018. Appellant did not stop work. On the reverse side of the Form CA-2 appellant's supervisor, R.D., indicated that there was visible mildew on the ceiling of a secured and currently vacant office, but that appellant did not have access to this area.

In support of his claim, appellant submitted a September 22, 2018 memorandum, which noted his exposure to leaky ceilings at work. He also submitted photographs of ceiling tiles.

OWCP, in a development letter dated October 24, 2018, advised appellant of the deficiencies in his claim. It requested that he submit additional factual and medical evidence and provided a questionnaire for his completion. In a separate letter of even date, OWCP notified the employing establishment of appellant's claim. It requested comments from a knowledgeable supervisor on the accuracy of appellant's statements, a description of his workplace exposure to potentially harmful substances, the air circulation/ventilation in his work area if air samples were not available, a list of tasks he performed which resulted in exposure or contact, a list of precautions taken to minimize effects of these activities, and a copy of his position description. OWCP afforded both parties 30 days to respond.

Thereafter, OWCP received an additional photographs of appellant's work area and a list of appellant's daily duty assignments.

By decision dated December 4, 2018, OWCP denied appellant's occupational disease claim, finding that he had failed to submit medical evidence to establish a medical diagnosis in connection with the accepted factors of his federal employment. It noted that he had not responded to the October 24, 2018 development letter. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA. The decision was mailed by OWCP to appellant's address of record.

Subsequently, OWCP received leave records, correspondence, and other documents regarding appellant's request for leave under the Family and Medical Leave Act, and whistleblower allegations. Appellant also submitted a letter decision from the employing establishment's regional counsel denying his claim under the Federal Tort Claims Act (FTCA) pertaining to his exposure to fungal spores at the employing establishment, advising that the claim could not be considered under the FTCA because it stems from a work-related injury. It advised

that the only remedy he had was to file a compensation claim under FECA or appeal the decision to the United States District Court.

A certification of healthcare provider report signed by Dr. Carl C. Jordan, a Board-certified otolaryngologist, on September 25, 2019, noted that appellant underwent nasal and functional endoscopic sinus surgery on September 10, 2019 and listed his restrictions from the date of surgery through September 24, 2019. In an operative note dated September 10, 2019, Dr. Jordan documented the surgery that he performed to treat appellant's preoperative diagnoses of bilateral frontal, sphenoid, and bilateral maxillary sinusitis, nasal airway obstruction, recurrent tonsillitis, and left lower lid eyelid cyst. The record reflects that environmental studies were received by OWCP in October and November 2019. On November 14, 2019 appellant requested reconsideration of the December 4, 2018 decision.

OWCP, by decision dated December 17, 2019, denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). The decision was mailed to his address of record.

On December 28, 2019 appellant requested reconsideration and submitted additional evidence. In a November 1, 2018 office clinical summary, Dr. Don A. Duplan, a Board-certified otolaryngologist, noted that appellant presented for evaluation for headaches and sinus infections. Appellant reported that his workplace had a mold problem and that when he went to work he experienced headaches. Dr. Duplan conducted an examination and diagnosed other allergic rhinitis, nasal congestion, and headache. He provided an impression that appellant's allergic rhinitis flared up more recently since he moved units at work where there was suspected mold exposure.

Appellant's November 13, 2018 consent form for allergy testing and administration of a flu vaccine and laboratory test results of even date were also submitted.

By decision dated March 23, 2020, OWCP denied modification of its December 4, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including the fact 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 period 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

³ *Supra* note 1.

⁴ *S.S.*, Docket No. 19-1815 (issued June 26, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

ANALYSIS

The Board finds that this case is not in posture for decision.

Appellant alleged that he developed an allergic nasal condition due to sustained exposure to harmful substances during the course of his federal employment. He noted that while working at the employing establishment he was exposed to severe mold infestations and leaky ceilings. In support of his claim, appellant submitted Dr. Duplan's November 1, 2018 office clinical summary, which diagnosed other allergic rhinitis, nasal congestion, and headache. Dr. Duplan opined that appellant's allergic rhinitis flared up when he had "suspected" exposure to mold at work.

On the reverse side of appellant's Form CA-2, his supervisor, R.D., controverted the claim asserting that, while there was visible mildew on the ceiling of a secured and currently vacant office, appellant did not have access to this area.

In a development letter dated October 24, 2018, OWCP requested that the employing establishment address the accuracy of appellant's allegations and describe his workplace exposure to potentially harmful substances. It specifically requested that the employing establishment provide detailed information, including the air circulation/ventilation in his work area if air samples were not available, a list of tasks he performed which resulted in exposure or contact, and a list of precautions taken to minimize effects of these activities. The employing establishment, however, did not respond to the specific questions regarding appellant's exposure to potentially harmful substances in OWCP's October 24, 2018 development letter. OWCP's procedures provide that the employing establishment is the best source for data regarding exposure to substances at the workplace.⁸

⁵ *M.H.*, Docket No. 19-0930 (issued June 17, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *S.A.*, Docket No. 19-1221 (issued June 9, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *R.G.*, Docket No. 19-0233 (issued July 16, 2019). *See also Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of the Factual Evidence*, Chapter 2.800.7.b(4) (June 2011).

Proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation benefits, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.⁹ In particular, OWCP has the responsibility to develop the evidence when such evidence is of the character normally obtained from the employing establishment or other government source.¹⁰

As Dr. Duplan provided an opinion that appellant's allergic rhinitis flared up when he had "suspected" exposure to mold at work and most importantly OWCP failed to obtain all relevant information from the employing establishment regarding the details of appellant's alleged exposure to a harmful substance, the Board will remand the case for OWCP to further develop the factual evidence in this case. On remand the Board shall obtain all relevant information from the employing establishment regarding mold or other harmful substances at the employing establishment as well as a statement of appellant's employment duties.¹¹ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

⁹ See *R.G.*, Docket No. 19-1059 (issued July 28, 2020); *D.M.*, Docket No. 19-0362 (issued June 11, 2019).

¹⁰ *Id.*

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 4, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board