

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

N.S., Appellant)	
)	
and)	Docket No. 23-0535
)	Issued: July 26, 2024
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Denver, CO, 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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 9, 2023 appellant filed a timely appeal from a September 26, 2022 merit decision and a February 2, 2023 nonmerit 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 over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a medical condition causally related to the accepted October 17, 2019 employment exposure; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances set forth in the Board's prior decision and order are incorporated herein by reference. The relevant facts are as follows.

On October 18, 2019 appellant, then a 57-year-old scheduling officer, filed a traumatic injury claim (Form CA-1) alleging that on October 17, 2019 she experienced an asthma attack when exposed to dust while in the performance of duty. She stopped work on that date.

In support of her claim, appellant submitted an October 17, 2019 hospital emergency department report by Dr. Richard D. Zane, Board-certified in emergency medicine, who related that appellant had a history of asthma and had not experienced a severe exacerbation since 2014 until that day while in her office in the baggage claim area at work. On examination, Dr. Zane observed diminished expiratory sounds with end expiratory wheezing, coughing, tachycardia, dyspnea, respiratory distress, and tremulousness. As nebulizer treatments in the emergency department did not improve appellant's symptoms, she was admitted to the intensive care unit. Dr. Zane diagnosed an asthma exacerbation attack.

In an October 17, 2019 intensive care unit report, Dr. Richard W. Vandivier, Board-certified in internal medicine and pulmonology, noted that appellant presented with acute shortness of breath while at work. He noted "[s]he states that there has been some construction and leaking of moldy odor fluid in her office[,] which likely precipitated her shortness of breath."

In an October 18, 2019 hospital discharge report, Dr. Vandivier diagnosed an asthma exacerbation and prescribed medication. He noted that it was important for appellant to avoid any environmental triggers, particularly at her workplace, "to prevent this from occurring again."

In a development letter dated June 12, 2020, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim, and provided a questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor on the accuracy of appellant's statements and the type of tasks performed, which resulted in the exposure and the duration. It afforded both parties 30 days to provide the necessary evidence.

In response, the employing establishment provided a June 22, 2020 statement confirming that in the area where appellant was seated on October 17, 2019, there were missing ceiling tiles and "large trashcans throughout the entire space where water was dripping. It appeared [that] the maintenance team for the airport was in the process of fixing something to do with the ceiling." There was also a "smell that was not right. [Appellant] began coughing and using her emergency inhaler." She left the area at her supervisor's instruction, but her breathing became more erratic. Paramedics were called to the scene and recommended appellant be taken to an emergency department. Appellant's husband then transported her to the hospital.

² Docket No. 21-1357 (issued March 15, 2022).

In a June 24, 2020 statement, appellant's supervisor asserted that on the date appellant experienced an asthma attack, "[w]hen entering the office there was a strong mildew smell with several wet ceiling tiles and trash cans filled with water." She began coughing 30 minutes after her arrival. Appellant exited the office to get fresh air as there was a "strong smell in the office," then began struggling to breathe. Paramedics were summoned and administered medication, which did not relieve appellant's symptoms. Appellant's husband then transported her to the hospital.

By decision dated July 23, 2020, OWCP accepted that the October 17, 2019 employment incident occurred as alleged. However, it denied appellant's claim, finding that she did not submit evidence containing a medical diagnosis in connection with the accepted October 17, 2019 employment exposure. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On August 11, 2020 appellant requested reconsideration. She submitted additional medical evidence.

In an August 4, 2020 report, Dr. Mark Nathanson, an osteopath specializing in family medicine, noted treating appellant for severe, persistent asthma for more than five years.

Appellant also submitted employing establishment e-mails dated from October 18 through 20, 2019 noting that a water pipe had broken above her work area, causing extensive leakage and significant odor. In an October 18, 2019 e-mail, a safety specialist advised that a subcontractor performing work in the ceiling of appellant's work area ("B Space") broke a water pipe "which caused flooding through the ceiling tiles[.]" Trash cans were placed in the cubicle to catch water. When the safety specialist entered the area four days later, she "saw the damage and it smelled horrible." The following day, "it had not been fixed and smelled even worse." The safety specialist cautioned there were "layers of particles that can easily set off [appellant's] asthma again." In an October 20, 2019 e-mail, a logistics team/inventory specialist noted that at 6:45 a.m., a cleaning crew "wiped down the walls, desks, floor mats[,] and cleaned the carpet. The team/inventory specialist noted that it "was a bit smelly while they were cleaning the carpet[.]"

By decision dated September 16, 2020, OWCP denied reconsideration of the merits of appellant's claim.

On December 2, 2020 appellant requested reconsideration. She submitted an October 1, 2020 report by Dr. Nathanson, who noted that she had been doing fairly well with her asthma until an exacerbation at work caused by black mold on waterlogged tiles, which caused her to be hospitalized due to the exposure. Dr. Nathanson diagnosed a resolved severe exacerbation of moderate persistent allergic asthma, vocal cord dysfunction, and stable asthma. He prescribed medication.

By decision dated March 5, 2021, OWCP modified its July 23, 2020 decision to reflect that appellant submitted medical evidence establishing a medical diagnosis in connection with the accepted October 17, 2019 employment incident. The claim remained denied, however, as it found that the medical evidence of record was insufficient to establish causal relationship between a diagnosed condition and the accepted October 17, 2019 employment exposure.

On May 12, 2021 appellant requested reconsideration. She submitted a May 7, 2021 statement reiterating her account of the events of October 17, 2019. Appellant also submitted an April 26, 2021 report from Dr. Nathanson noting that her “[a]cute attack[,] which led to hospitalization” was “caused by dust and other particulate components[,] which stemmed from wet ceiling tiles at her place of work.” He opined “this is what brought on her attack.”

By decision dated May 19, 2021, OWCP denied appellant’s request for reconsideration. It found, “[s]pecifically, causal relationship is a medical issue, and you did not submit any medical evidence in support of your request for reconsideration. We have not received a well-rationalized report.”

On September 14, 2021 appellant appealed to the Board.

By decision dated March 15, 2022,³ the Board found the case not in posture for decision as OWCP’s May 19, 2021 decision had not referenced Dr. Nathanson’s April 26, 2021 report. It remanded the case for proper consideration of all evidence of record and issuance of a *de novo* decision.

By decision dated April 15, 2022, OWCP denied appellant’s traumatic injury claim. It found that the medical evidence of record, including Dr. Nathanson’s April 26, 2021 report, was insufficient to establish causal relationship between the accepted employment incident and the diagnosed conditions. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On May 9, 2022 appellant requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review.

Prior to the hearing, OWCP’s hearing representative issued a July 26, 2022 decision setting aside the April 15, 2022 decision and remanding the case for further development of the medical evidence. The hearing representative noted that Dr. Nathanson’s April 26, 2021 report, although not entirely well rationalized, “presented *prima facie* evidence of causal relationship between [appellant’s] medical condition and her work exposure. He has affirmatively stated that [she] sustained an acute exacerbation of her preexisting asthma due to her exposure to black mold on ceiling tiles, dust, and other particulate components[,] which stemmed from wet ceiling tiles in her office.”

The hearing representative directed that OWCP afford appellant and the employing establishment an opportunity to provide factual evidence as to whether black mold had been found on the ceiling tiles or other surfaces. Upon receipt of the additional factual information, OWCP should prepare a statement of accepted facts (SOAF) “reflecting the accepted exposure to dust, a bad smell, and wet ceiling tiles (and mold, if factually supported), and refer” appellant to a Board-certified pulmonologist for a second opinion evaluation. The hearing representative directed that following receipt of the second opinion report, OWCP should issue a *de novo* decision on the initial adjudication of the claim.

³ *Id.*

In a development letter dated August 17, 2022, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor as to whether it concurred with appellant's allegations. It included the following language: "[p]lease provide factual evidence as to whether there was black mold found on the ceiling tiles or on any other surface that the claimant was exposed to in her [o]ffice on October 17, 2019." In a separate development letter of even date, OWCP requested that appellant "provide factual evidence as to whether there was black mold found on the ceiling tiles or on any other surface that [she] was exposed to in her office on October 17, 2019." It afforded both parties 30 days to respond. OWCP did not receive a response from appellant or the employing establishment within the time allotted.

By decision dated September 26, 2022, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish causal relationship between her diagnosed medical conditions and the accepted October 17, 2019 employment exposure. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On December 21, 2022 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received a December 20, 2022 report by Dr. Nir Goldstein, Board-certified in pulmonology, internal medicine, critical care medicine, and sleep medicine, recounting a history of injury and treatment. He noted that, while at work in October 2019, appellant had been exposed to "a water leak from the ceiling with an unpleasant smell/irritant[,] which led to bronchospasm, cough, chest congestion, and dyspnea that required medical attention." Dr. Goldstein provided spirometry results and diagnosed asthma and vocal cord dysfunction. He opined that "[f]rom a pulmonary perspective it is certainly plausible that this irritant exposure resulted in an acute exacerbation of her underlying asthma at that time."

By decision dated February 2, 2023, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing, finding that it was untimely filed. It further exercised its discretion and determined that the issue in the case could equally well be addressed by a request for reconsideration before OWCP along with the submission of new evidence supporting that she had sustained a medical condition causally related to work factors.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including 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 of FECA,⁵ 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 to the

⁴ *Supra* note 1.

⁵ *See J.K.*, Docket No. 20-0527 (issued May 24, 2022); *J.C.*, Docket No. 20-0882 (issued June 23, 2021); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

employment injury.⁶ 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.⁷

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, OWCP must first determine whether fact of injury has been established.⁸ There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.⁹ Second, the employee must submit evidence, in the form of probative medical evidence, to establish that the employment incident caused an injury.¹⁰

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹¹ A physician's opinion on whether there is a causal relationship between the diagnosed condition and the employment injury must be based on a complete factual and medical background.¹² Additionally, the physician's 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 employment injury.¹³

In a case in which a preexisting condition involving the same part of the body is present and the issue of causal relationship, therefore, involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.¹⁴

ANALYSIS -- ISSUE 1

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

The Board finds that the factual evidence of record is sufficient to establish appellant's exposure to trash cans full of water, wet ceiling tiles, dust, and other particulate components, which

⁶ *J.K., id.*; *J.C., id.*; *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *S.P.*, 59 ECAB 184 (2007).

⁹ *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

¹⁰ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

¹² *S.V.*, Docket No. 22-1010 (issued February 21, 2023); *F.A.*, Docket No. 20-1652 (issued May 21, 2021); *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹³ *Id.*

¹⁴ *See G.D.*, Docket No. 20-0966 (issued July 21, 2022); *R.C.*, Docket No. 19-0376 (issued July 15, 2019); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

stemmed from the wet ceiling tiles. In an October 18, 2019 e-mail and a June 22, 2020 statement, the employing establishment confirmed a broken water pipe in the ceiling of her work area on October 17, 2019, with “flooding through the ceiling tiles,” placement of multiple trash cans to catch the water, significant odor, and “layers of particles[.]” An employing establishment team/inventory specialist noted in an October 20, 2019 e-mail that it “was a bit smelly while they were cleaning the carpet[.]” Her supervisor recalled in a June 24, 2020 statement that on October 17, 2019, there “was a strong mildew smell” in her work area, with “wet ceiling tiles and trash cans filled with water.”

Appellant submitted medical evidence, which attributed the October 17, 2019 asthma attack to wet ceiling tiles and particulates as factually established. In his April 26, 2021 report, Dr. Nathanson opined that appellant’s “[a]cute attack[,] which led to hospitalization” was “caused by dust and other particulate components[,] which stemmed from wet ceiling tiles at her place of work.”

The Board finds Dr. Nathanson’s April 26, 2021 report is sufficient to require further development of the medical evidence. While his report is not completely rationalized to meet appellant’s burden of proof to establish her claim, it raises an uncontroverted inference between his diagnosed medical conditions and the accepted employment exposure and is, therefore, sufficient to require OWCP to further develop appellant’s claim.¹⁵

The Board will, therefore, remand the case to OWCP for further development of the medical evidence. On remand OWCP shall refer appellant, a SOAF and the medical evidence of record to a pulmonologist. The referral physician shall provide a rationalized opinion on whether the diagnosed conditions are causally related to the accepted employment exposure. If the physician opines that the diagnosed conditions are not causally related, he or she must explain with rationale how or why his or her opinion differs from that of Dr. Nathanson. 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.

¹⁵ *J.K. (nee R.)*, Docket No. 23-0959 (issued February 14, 2024); *C.D.*, Docket No. 22-1191 (issued December 23, 2022); *D.V.*, Docket No. 21-0383 (issued October 4, 2021); *K.S.*, Docket No. 19-0506 (issued July 23, 2019); *H.T.*, Docket No. 18-0979 (issued February 4, 2019); *D.W.*, Docket No. 17-1884 (issued November 8, 2018); *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2022 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. The February 2, 2023 decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: July 26, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board