

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

<hr/>		
F.S., Appellant)	
)	
and)	Docket No. 24-0480
)	Issued: July 10, 2024
DEPARTMENT OF AGRICULTURE, FOOD)	
SAFETY AND INSPECTION SERVICE,)	
OFFICE OF PUBLIC HEALTH SCIENCE)	
WESTERN LABORATORY, Albany, CA,)	
Employer)	
<hr/>)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 4, 2024 appellant filed a timely appeal from a January 18, 2024 merit decision and February 23 and March 7, 2024 nonmerit decisions 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 his burden of proof to establish an injury in the performance of duty, as alleged; (2) whether OWCP properly denied appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b); and (3) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 14, 2023 appellant, then a 66-year-old supply clerk, filed an occupational disease claim (Form CA-2) alleging that he developed pneumonia due to factors of his federal employment, which included “extreme temperature” and “recurrence of same conditions.” He noted that he first became aware of his condition on February 1, 2023, and realized its relation to his federal employment on July 5, 2023. Appellant stopped work on July 13, 2023, and returned to work on July 24, 2023.

In a July 16, 2023 treatment note, Dr. Tuan Minh Dang, a Board-certified internist, indicated that appellant was hospitalized on July 5, 2023, and would be discharged on July 16, 2023. He requested that appellant be excused from work for the period July 5 to 16, 2023, and advised that appellant could return to work on or after July 16, 2023.

In a July 27, 2023 treatment note, Dr. Linda Aragon, an internist, noted that appellant could return to work on August 14, 2023.

In a development letter dated August 8, 2023, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 60 days to respond. In a separate development letter of the same date, it requested additional information from the employing establishment, including comments from a knowledgeable supervisor. OWCP afforded the employing establishment 30 days to respond.

In a January 26, 2023 report, Dr. Jasmine Ajit Shah, Board-certified in critical care medicine, noted that appellant should not work in an environment with excessive environmental exposures or exposures to fumes, dust, or strong fragrances, and recommended that he work outside that setting.

February 12, 2023 hospital admission notes from Dr. Michael Stewart Hampton, an emergency medicine physician, indicated that appellant was seen for nasal congestion and abdominal pain with deep inspiration.

A February 15, 2023 return-to-work note from Dr. Aragon advised that appellant could return to work on February 17, 2023.

OWCP received an undated return-to-work note from Dr. Amninder Singh, Board-certified in emergency medicine, who noted that appellant was seen at urgent care on June 12, 2023, and could return to work on June 14, 2023.

Urgent care notes dated June 12, 2023 signed by Daniel Jospeh Davidson, a nurse, indicate that appellant was seen that day for pneumonia. A chest x-ray taken that day revealed findings consistent with chronic obstructive pulmonary disorder (COPD) and lobar pneumonia.

OWCP received a June 14, 2023 indoor air quality (IAQ) report for the employing establishment which related the following findings.

“An abbreviated IAQ assessment was conducted at the Western Lab to determine causative factors of a poor indoor air environment. The results indicate that there’s

no single overwhelming issue or ‘smoking gun,’ but rather multiple issues that are contributing to a poor indoor environment. First and foremost, there’s no heating, ventilating and air conditioning (HVAC) system online in most Western Laboratory spaces, thus, the air is not treated to a comfortable level. Indoor temperatures are near outdoor levels in many spaces. There were signs of moisture intrusion into building materials without correcting the source or root cause of building leaks during periods of precipitation, additionally, there was an indication of an air imbalance throughout the building. All of these issues play a role in contributing to a poor indoor air environment and can contribute to workers suffering adverse health, especially among personnel who are immunocompromised or have chronic underlying conditions.”

In August 1 and 2, 2023 hospital notes, Dr. Dang noted that appellant had a history of recurrent pneumonia, COPD, and presented with a fever and cough. He also noted that appellant was discharged on July 16, 2023, for pneumonia in the right upper lobe, and ruled out tuberculosis. Dr. Dang diagnosed acute febrile illness with leukocytosis, that could be due to recurrent or incomplete treatment of right upper lobe pneumonia, and right upper lobe mass-like consolidation to be treated as pneumonia.

In an October 12, 2023 statement, K.N., the Chemistry Branch Chief at the employing establishment, related that appellant was exposed to extremely cold temperatures as well as humidity levels that likely led to mold. She attached a recent IAQ assessment that noted, “Sample Receiving personnel work in an environment where they are required to open the bay doors (garage like door) to receive shipments and samples from various parts of the country. When the bay doors are opened during the winter, personnel are exposed to the elements and are provided freezer jackets and portable heaters to help reduce the effects of cold weather. Given the lack of central heat last winter, temperatures inside the Sample Receiving area on cold days reportedly hovered around 40°F or below.” The report further noted that, “IAQ meter results found in Table 2 indicate that Sample Receiving had the highest levels of humidity at 71 percent. In general, to inhibit any potential mold growth, relative humidity (RH) levels should be maintained below 60 percent....”

OWCP received an after-visit summary dated December 8, 2023, that indicated a diagnosis of acute respiratory distress.

By decision dated January 18, 2024, OWCP denied appellant’s claim. It explained that he failed to provide a clear statement of the work factors alleged to have caused injury. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On February 20, 2024 appellant requested a review of the written record by a representative of OWCP’s Branch of Hearings and Review *via* the Employees’ Compensation Operations & Management Portal (ECOMP).

By decision dated February 23, 2024, OWCP denied appellant’s request for a review of the written record as untimely filed, finding that his request was not made within 30 days of its January 18, 2024 decision. It concluded that he was not entitled to a review of the written record as a matter of right and further exercised its discretion and determined that the issue could be equally well addressed through a request for reconsideration.

On March 3, 2024 appellant requested reconsideration.

OWCP received a February 9, 2024 progress note from Dr. Shah indicating that appellant had asthma and COPD with other comorbidities. Dr. Shah related appellant's complaints about poor working conditions, including poor air quality with the presence of particulate matter, and low temperatures.

By decision dated March 7, 2024, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA² 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,³ 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 employment injury.⁴ 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.⁵

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (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.⁶

With respect to the first component of fact of injury, the employee has the burden of proof to establish the occurrence of an injury at the time and place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence.⁷ An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁸ An employee has not met his

² *Id.*

³ See *S.F.*, Docket No. 23-0264 (July 5, 2023); *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁶ *T.W.*, Docket No. 20-0767 (issued January 13, 2021); *L.D.*, Docket No. 19-1301 (issued January 29, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019).

⁷ *T.J.*, Docket No. 17-0831 (issued November 7, 2017); *David Apgar*, 57 ECAB 137 (2005).

⁸ See *C.R.*, Docket No. 18-1332 (issued February 13, 2019); see *Betty J. Smith*, 54 ECAB 174 (2002).

or her burden of proof to establish the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant has met his burden of proof to establish that the employment factors occurred in the performance of duty, as alleged.

On his Form CA-2 appellant alleged that he developed pneumonia due to factors of his federal employment, which included “extreme temperature” and “recurrence of same conditions.” OWCP’s procedures provide that the employing establishment is the best source for data regarding exposure to substances at the workplace.¹⁰

OWCP received a June 14, 2023 IAQ report of the employing establishment which related that there were multiple issues that were contributing to a poor indoor environment. It noted that there was no heating, ventilating and air conditioning system online in most employing establishment laboratory spaces, thus, the air is not treated to a comfortable level. Indoor temperatures are near outdoor levels in many spaces. Also, there were signs of moisture intrusion into building materials without correcting the source or root cause of building leaks during periods of precipitation, and an indication of an air imbalance throughout the building. The report concluded that all of these issues played a role in contributing to a poor indoor air environment and could contribute to workers suffering adverse health, especially among personnel who are immunocompromised or have chronic underlying conditions.

In an October 12, 2023 statement, the Chemistry Branch Chief at the employing establishment, related that appellant was exposed to extremely cold temperatures as well as humidity levels that likely led to mold. She attached a recent IAQ assessment that explained that employees worked in an environment where they were required to open the bay doors to receive shipments and samples. When the bay doors were opened during the winter, employees were exposed to the elements and were provided freezer jackets and portable heaters to help reduce the effects of cold weather. Given the lack of central heat last winter, temperatures on cold days reportedly hovered around 40°F or below. The report further noted that the employing establishment had high levels of humidity at 71 percent. In general, to inhibit any potential mold growth, RH levels should be maintained below 60 percent.

The Board finds that the June 14, 2023 IAQ report of the employing establishment as well as the October 12, 2023 statement from the employing establishment Chemistry Branch Chief establish the alleged factors of employment. Appellant was exposed to extreme temperatures and humidity at the employing establishment.

⁹ See *C.R., id.*; *Linda S. Christian*, 46 ECAB 598 (1995).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7.b(4) (June 2011).

As appellant has established that the employment factors occurred in the performance of duty as alleged, the question becomes whether the employment factors caused an injury.¹¹ Thus, further consideration of the medical evidence is necessary.¹² The case will be remanded to OWCP for evaluation of the medical evidence to determine whether there is a causal relationship between appellant's diagnosed conditions and the accepted factors of his federal employment. Following this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.¹³

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that the employment factors occurred in the performance duty, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the January 18, 2024 decision of the Office of Workers' Compensation Programs is reversed, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 10, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

¹¹ *F.S.*, Docket No. 21-1040 (issued March 10, 2023); *D.F.*, Docket No. 21-0825 (issued February 17, 2022); *M.A.*, Docket No. 19-0616 (issued April 10, 2020); *C.M.*, Docket No. 19-0009 (issued May 24, 2019).

¹² *L.G.*, Docket No. 19-0201 (issued June 26, 2019); *see M.D.*, Docket No. 18-1365 (issued March 12, 2019).

¹³ Given the Board's disposition of Issue 1, Issues 2 and 3 are rendered moot.