

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

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S.W., Appellant)	
)	
and)	Docket No. 23-0922
)	Issued: October 18, 2024
DEPARTMENT OF VETERANS AFFAIRS,)	
JOHN J. PERSHING VA MEDICAL CENTER,)	
Poplar Bluff, MO, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On May 31, 2023 appellant filed a timely appeal from an April 17, 2023 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 over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the April 17, 2023 decision, appellant submitted additional evidence to OWCP. 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 that the claimed exposure to mold on January 3, 2023 occurred as alleged.

FACTUAL HISTORY

On January 9, 2023 appellant, then a 51-year-old medical technologist, filed a traumatic injury claim (Form CA-1) alleging that on January 3, 2023 he developed an allergic reaction, asthma attack, and sinus swelling when he was exposed to allergens while in the performance of duty.³ He indicated that he was interviewing bargaining unit employees and collecting air quality samples at the employing establishment's community based outpatient clinic (CBOC). Appellant explained that, while interviewing employees, he experienced itching, difficulty breathing, and burning eyes and had to use an albuterol inhaler. He noted that an air quality meter showed elevated allergens and elevated formaldehyde. Appellant stopped work on January 5, 2023 and returned on January 9, 2023. On the reverse side of the claim form, the employing establishment contended that he was not injured in the performance of duty.

In support of his claim, appellant submitted a lab analysis report, which was prepared for him. The report indicated that air samples and surface samples were taken on January 3, 2023 at the employing establishment CBOC. The air samples taken revealed "normal spore counts" in Rooms 105 and 152; however, "some spore counts were elevated" in Room WP 108. The surface samples taken revealed "normal spore counts" in all three rooms. OWCP also received a printout of air quality measurements from testing performed on January 3, 2023.⁴

Appellant submitted statements dated January 3, 2023 wherein D.N. and A.B. described developing symptoms such as coughing, sneezing, itchy throat, stuffy nose, and eye irritation after working in the employing establishment CBOC.

In a January 4, 2023 statement, T.S. indicated that when he went to the employing establishment CBOC with appellant the day prior, he experienced allergy symptoms including

³ OWCP assigned the present claim OWCP File No. xxxxxx275. Appellant has a prior traumatic injury claim (Form CA-1) under OWCP File No. xxxxxx215, alleging that he sustained brain, body, and facial swelling and difficulty breathing when he was exposed to mold while in the performance of duty on January 14, 2019. He also has a prior occupational disease claim (Form CA-2) under OWCP File No. xxxxxx158, alleging that he developed an allergic reaction, shortness of breath, fatigue, blurred vision, and confusion due to exposure to mold while in the performance of duty. Appellant noted that he first became aware of his condition on March 1, 1990 and realized its relation to his federal employment on February 1, 2015. He also has an occupational disease claim (Form CA-2) under OWCP File No. xxxxxx970, alleging that he sustained an emotional condition due to harassment by coworkers and disciplinary actions by supervisors in relation to his complaints of mold exposure. Appellant noted that he first became aware of his condition and realized its relation to his federal employment on November 14, 2014. His claims have been administratively combined, with OWCP File No. xxxxxx158 serving as the master file.

⁴ Appellant also submitted prior environmental microbiology test results dated April 20, 2020; formaldehyde air sampling results dated August 19, 2020; a sketch of the clinic where formaldehyde samplings were taken; formaldehyde testing results dated August 24, 2020; mold testing results dated August 27, 2020 along with accreditation documents; and indoor air quality screening test results dated September 8, 2020.

stuffiness in his nose and red eyes within an hour. He also experienced sneezing, coughing, headache, and shortness of breath.

Appellant submitted an unsigned after-visit summary report dated January 6, 2023, which indicated that appellant was diagnosed with other acute recurrent sinusitis. The summary noted that appellant was allergic to mold and trees, both with a reaction of sinusitis, verified as of July 22, 2015.

In a memorandum dated January 11, 2023, H.L., a local union vice president, recounted that on January 3, 2023 he contacted appellant regarding the mold and formaldehyde testing that was completed at the employing establishment CBOC. He noted that appellant was at the clinic for approximately four to five hours and experienced symptoms, including extreme congestion, shortness of breath, fatigue, raspy voice, and a headache. H.L. noted that appellant informed him that he was feeling the effects of the poor air quality in the building.

In an attending physician report (Form CA-20) dated February 7, 2023, Dr. Natasha Ware, a family medicine specialist, noted a January 3, 2023 date of injury. She reported that, while performing union duties at the employing establishment CBOC, appellant experienced congestion and difficulty breathing. Dr. Ware diagnosed acute recurrent sinusitis. She checked a box marked “Yes” indicating that the employment activity caused or aggravated the medical condition. Dr. Ware explained that exposure to mold at the CBOC triggered allergies, resulting in sinusitis.

In statements dated February 22 and 25, 2023, appellant explained that he was removed from work because the employing establishment did not have available jobs within his work restrictions. He noted that his doctors recommended that he work in an area without humidity and within federal guidelines for air quality. Appellant contended that a new mold report from an industrial hygienist hired by the employing establishment showed that *Aspergillus* spore count was above the industry standard in Rooms 111, 123, 105, and 108. He submitted copies of his unemployment verification and request for light-duty assignment.

OWCP received a copy of a Sitex Environmental Inc. indoor air quality evaluation and formaldehyde sample performed for the employing establishment on February 2, 2023 at the CBOC. The study revealed that “[m]old air samples appeared to show common mold amplification within the building” and recommended corrective actions including removing and replacing water-stained ceiling tiles and installing stronger air filters. Supporting documentation such as reading measurements, testing results, a floor plan, equipment calibration, laboratory analytical results, and individual mold certifications were appended to the study.

In a March 2, 2023 development letter, 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 completion. OWCP afforded appellant 30 days to provide the necessary evidence.

In a March 15, 2023 response, appellant explained that, while engaged in his union duties at the employing establishment CBOC, he experienced congestion and difficulty breathing. He noted that he had preexisting mold-related asthma and sinusitis. Appellant reported that his current diagnosis was acute recurrent sinusitis.

In a report dated March 10, 2023, Dr. Ware explained that an air sample collected on January 3, 2023 revealed mold spore counts over three times the amount observed outside. She indicated that when appellant inhaled these elevated indoor mold spores, it caused inflammation of appellant's sinuses, which caused acute sinusitis and increased sensitivity to molds.⁵

In a statement dated April 4, 2023, appellant explained that he did not work at the employing establishment CBOC; rather, he was there for approximately five hours to address safety issues. He indicated that his symptoms of acute sinusitis began shortly after entering the premises. Appellant reported that his doctor advised him to avoid damp and moldy environments, but his workplace was unable to accommodate his restrictions. He contended that he was entitled to wage-loss compensation since the employing establishment could not provide employment within his restrictions.

In statements dated April 3 and 14, 2023, appellant discussed his history of alleged mold exposure at work and noted that recently on January 3, 2023 he went to urgent care for treatment after a mold-related incident. He indicated that on February 22, 2023 mold was found growing in his workplace again and testing revealed that the type of mold found was aspergillus, penicillium, and candida. Appellant noted that he was known to be sensitive to these types of mold. He described the employing establishment's attempts to remediate the mold at his workplace. Appellant asserted that there was clear factual evidence of the amount of mold that he was exposed to at his place of employment and clear medical opinion that the inhalation of this allergen aggravated his sinusitis and increased sensitivity to allergens. He submitted a mold identification report dated February 27, 2023.

Appellant submitted a timesheet printout for pay period 2 of 2023, covering the period January 15 through 28, 2023. He also submitted screenshots of chat messages dated January 3, 2023 regarding his need to report to the CBOC on that date.

By decision dated April 17, 2023, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the claimed exposure to mold on January 3, 2023 occurred as alleged. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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

⁵ Appellant also submitted a September 23, 2020 note, wherein Dr. Ware recounted that she had treated appellant since April 2014, and that testing revealed that appellant was very sensitive to aspergillus. Dr. Ware indicated that mold growth was found at appellant's work environment, even after mold remediation efforts were completed. She opined that appellant's mold exposure at his place of employment had a significant negative impact on his health. In a January 21, 2021 note, Dr. Ware indicated that she had personally reviewed the extensive case file for appellant, including office visits and consultations to various specialists. OWCP also received an affidavit dated October 12, 2022, wherein S.M., a clinical laboratory scientist, who indicated that she was aware of mold coming out of the vents in the laboratory and humidity levels in the laboratory being high.

⁶ *Supra* note 1.

States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,⁷ 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.⁸ 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.⁹

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. The first component is whether the employee has submitted sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.¹⁰

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.¹¹ The employee has not met his or her burden of proof establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Such circumstances such as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast serious doubt on an employee's statement.¹² An employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.¹³

ANALYSIS

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

⁷ *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁸ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁹ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *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).

¹⁰ *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

¹¹ *S.W.*, Docket No. 17-0261 (issued May 24, 2017).

¹² *C.M.*, Docket No. 20-1519 (issued March 22, 2019); *S.A.*, Docket No. 19-0613 (issued August 22, 2019); *Betty J. Smith*, 54 ECAB 174 (2002).

¹³ *A.C.*, Docket No. 18-1567 (issued April 9, 2019); *D.B.*, 58 ECAB 529 (2007); *Gregory J. Reser*, 57 ECAB 277 (2005).

Appellant alleged that on January 3, 2023 he developed an allergic reaction, asthma attack, and sinus swelling when he was exposed to allergens while interviewing bargaining unit employees and collecting air quality samples at the employing establishment's CBOC. On the reverse side of the claim form, the employing establishment contended that appellant was not injured in the performance of duty. In a March 2, 2023 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for completion. OWCP afforded appellant 30 days to provide the necessary evidence. OWCP, however, did not request a statement from the employing establishment concerning appellant's allegations, as is required under its procedures.¹⁴

OWCP's regulations provide that an employer who has reason to disagree with an aspect of the claimant's allegation should submit a statement that specifically describes the factual argument with which it disagrees and provide evidence or argument to support that position.¹⁵ Its procedures further provide in certain types of claims, such as when performance of duty is at issue, a statement from the employer is imperative to properly develop, and adjudicate the claim.¹⁶

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.¹⁷ It shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.¹⁸ Since appellant's allegations and the evidence of record indicate that the employing establishment would have in its possession evidence relevant to appellant's allegation of mold exposure, OWCP should obtain a detailed response from the employing establishment to these allegations.¹⁹

As such, the Board shall remand the case for OWCP to further develop appellant's emotional condition claim. On remand OWCP shall obtain all relevant information from the employing establishment necessary to determine whether appellant was exposed to mold while in the performance of duty. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7 (June 2011). *See also*, *W.S.*, Docket No. 24-0082 (issued April 8, 2024).

¹⁵ 20 C.F.R. § 10.117(a). *See also* *A.F.*, Docket No. 20-1635 (issued June 9, 2022); *P.K.*, Docket No. 21-0967 (issued December 3, 2021).

¹⁶ *Supra* note 14.

¹⁷ *L.G.*, Docket No. 21-0690 (issued December 6, 2021).

¹⁸ *K.W.*, Docket No 15-1535 (issued September 23, 2016).

¹⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2023 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: October 18, 2024
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board