United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 20-1249**
	)	**Issued: February 9, 2021**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTION INSTITUTION, Fort Dix, NJ, Employer	)	

Appearances:
Aaron B. Aumiller, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 1, 2020 appellant, through counsel, filed a timely appeal from a March 31, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

ISSUE

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

FACTUAL HISTORY

On May 7, 2017 appellant, then a 38-year-old computer specialist, filed an occupational disease claim (Form CA-2) alleging that he experienced respiratory symptoms including shortness of breath and chronic cough due to exposure to cement dust containing silica during construction at his office beginning in July 2016. He noted that he first became aware of his condition and realized that it was caused or aggravated by his federal employment on February 15, 2017. Appellant did not immediately stop work.

Appellant underwent a computerized tomography (CT) scan of the temporal bones on October 11, 2016, which revealed marked leftward nasal septal deviation, right middle third oncha bullosa, left maxillary sinus mucosal thickening, mucous retention cysts, and mild mucosal thickening in the ethmoid air cells. A March 14, 2017 x-ray of the chest revealed no evidence of acute cardiopulmonary abnormality.

On March 20, 2017 Dr. Ben J. Kochuveli, a Board-certified family practitioner, diagnosed weekly nose bleeds year round, allergic rhinitis, chronic sinusitis, and potential silica exposure due to cement dust. He noted that the baseline chest x-ray was negative. In an April 12, 2017 addendum report, Dr. Kochuveli indicated that appellant underwent pulmonary function studies on April 11, 2017 and was diagnosed with silica exposure. He indicated that the pulmonary function studies revealed borderline mild obstruction based on a borderline low forced expiratory volume in one second (FEV^1)/slow vital capacity (SVC) ratio and FEV^1 90 percent of predicted.

In a narrative statement dated May 7, 2017, appellant reported commencing work at the information technology department in July 2016. He indicated that his office was located in the server room of the west administration building, which was undergoing construction to modify the existing server room, by encasing it in a cinder block wall. Appellant worked in this post during the construction period, which began in July 2016 and continued through April 2017. He indicated that his office was in a confined work space without ventilation. Appellant reported exposure to silica, which affected his lungs, sinuses, and head and caused severe sinus headaches, chronic dry cough, and shortness of breath. He indicated that the construction was performed by federal inmates that lacked the knowledge of Occupational Safety Health Administration (OSHA)

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the March 31, 2020 decision, OWCP received additional evidence. 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.*

regulations. Appellant further noted that the construction included a cement machine located in the building. He advised that an outside contractor removed asbestos floor tiling from the server room and informed him that the amount of dust present was at dangerous levels and contained silica.

In a June 29, 2017 development letter, OWCP informed appellant that the evidence of record was insufficient to establish 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. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information regarding appellant's exposure to potentially harmful substances, and comments from a knowledgeable supervisor regarding the accuracy of his statements. It afforded both parties 30 days to respond.

In response to the development letter, appellant submitted a July 16, 2017 statement and reiterated the details of his silica exposure while working in the server room during construction. He asserted that the employing establishment willfully failed to comply with OSHA standards. Appellant noted that he was exposed to concrete dust containing crystalline silica for months during construction while working in the server room without a ventilation system. He indicated that dust was visible on all work surfaces in the air and on some of the server equipment. Appellant performed computer/server maintenance while being exposed to the hazardous materials and was not informed of hazards. He indicated that he had no known exposure to irritants outside his job. Appellant related that his silica condition began in early August 2016 with chronic severe sinus headaches, chronic dry cough, and shortness of breath. He reported no known pulmonary condition or known allergies and indicated that he smoked cigarettes from 2003 to 2005.

On July 25, 2017 an employing establishment environmental and safety compliance official, responded to OWCP's development letter and challenged appellant's allegations. The official disagreed with assertions that the employing establishment willfully violated OSHA standards relating to respirable crystalline silica and noted that the employing establishment implemented a crystalline silica plan, although not required to do so, and hired an environmental contractor to conduct testing and provide expertise on how to safely perform construction. Additionally, plastic barriers were put in place along with a negative pressure fan to limit the exposure to employees. The official advised that all inmates involved in construction duties received job orientation on all aspects of their assignment including safety. The official indicated that appellant failed to immediately report hazards to the safety manager and when he did notify the safety manager all protocols were in place. Additionally, the safety manager offered appellant the option to move to another office in a different building until construction was complete. The official further indicated that appellant did not request reasonable accommodation, but when he expressed concerns to the safety manager about the construction in his workplace he was advised that he could move to another location. The official further noted that staffing shortages did not affect appellant's workload and he generally performed his required duties in accordance with expectations.

The employing establishment submitted a news release from OSHA dated April 6, 2017, indicating that it was delaying enforcement of a crystalline silica standard in the construction industry. In a June 26, 2017 memorandum entitled, "Safe Work Environment" the employing establishment established procedures to insure a safe environment for staff and inmates related to

asbestos, lead, and silica issues in the workplace before, during, and after any renovation, construction, or repair. OWCP also received a position description for an information technology specialist.

In a September 7, 2017[4] report, Dr. Kochuveli noted evaluating appellant on March 20, 2017 and opined that he was completely asymptomatic and had a negative chest x-ray on February 22, 2017. He diagnosed allergic rhinitis and returned him to work without restrictions.

By decision dated January 22, 2018, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish the implicated employment factors. It explained that he failed to provide results of air sample testing in the areas where he worked or provide witness statements supporting his exposure to crystalline silica. OWCP concluded, therefore, that appellant had not met the requirements to establish that he sustained an injury as defined by FECA.

On January 22, 2019 appellant, through counsel, requested reconsideration. He submitted a witness statement from T.K., a retired computer specialist, who confirmed that office construction began in July 2016 and appellant's office was located in the server room. T.K. indicated that, during appellant's absence, she would monitor the server room for extended periods and at times her breathing became labored and she experienced chronic coughing. She further noted that breathing protection was not required. In another witness statement dated August 16, 2018, J.J., a retired computer services manager and appellant's supervisor in July 2016, indicated that appellant was required to stay in the server room on and off for about eight months while renovations were implemented. He verified that the server room lacked proper ventilation and there was a substantial amount of dust accumulated daily after construction. J.J. further verified that staff were not required to wear any form of respiratory masks or ventilation device.

By decision dated March 14, 2019, OWCP modified the January 22, 2018 decision, finding that appellant had established that the employment exposure occurred as alleged. The claim remained denied, however, as the medical evidence of record was insufficient to establish causal relationship between a diagnosed medical condition and the accepted employment exposure.

On January 14, 2020 Dr. Sarah M. Lyon, a Board-certified pulmonologist, treated appellant for shortness of breath with exertion and chronic cough, which he attributed to silica dust exposure. Appellant reported extensive silica exposure in 2016 for eight to nine months while working in a computer server room without respiratory mask protection. Dr. Lyon indicated that the pulmonary function study done in May 2019[5] revealed normal spirometry; however, it also showed evidence of small airway disease. She indicated that from 2017 through 2019 there was nonsignificant reduction in his FEV^1, which remained normal. Dr. Lyon noted that evidence supported that workers with chronic silica exposure even within OSHA limitations and with normal chest imaging have worsening pulmonary function associated with silica exposure. She further noted that workers exposed to silica may have normal spirometry and have a range of pulmonary test abnormalities.

[4] Although Dr. Kochuveli dated his report September 7, 2018, this appears to be a typographical error.

[5] This report is not in the record before the Board.

Dr. Noam A. Cohen, a Board-certified otolaryngologist, treated appellant on February 24, 2020 for symptoms consistent with chronic rhinosinusitis. Appellant reported that, four years prior, he was exposed to substantial amounts of cinder block dust. Dr. Cohen noted that a paranasal sinus computerized tomography (CT) scan on May 16, 2019[6] demonstrated mucosal thickening of his ostial meatus complexes bilaterally and opacification of his right frontoethmoidal recess and anterior ethmoid cavities bilaterally. He opined that these findings were consistent with hindered mucociliary clearance. Dr. Cohen noted that studies from the Work Trade Center workers revealed that exposure to aerosolized particulate debris hinder mucociliary clearance and can contribute to chronic rhinosinusitis.

On February 28, 2020 appellant, through counsel, requested reconsideration.

By decision dated March 31, 2020, OWCP denied modification of the March 14, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[7] 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,[8] 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.[9] 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.[10]

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.[11]

[6] *Id.*

[7] *Supra* note 2.

[8] *Id.*

[9] *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989); *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[10] *L.C., id.*; *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr., id.*

[11] 20 C.F.R. § 10.115; *E.S.*, Docket No. 18-1580 (issued January 23, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[12] The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[13] Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.[14]

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.[15]

ANALYSIS

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

On January 14, 2020 Dr. Lyon treated appellant for shortness of breath and chronic cough attributed to extensive silica exposure, which occurred in 2016 while he was working in a computer server room without respiratory mask protection. She indicated that a pulmonary function study done in May 2019 revealed normal spirometry; however, it also showed some evidence of small airway disease. Dr. Lyon opined that evidence from studies demonstrated that workers with chronic silica exposure, even within OSHA limitations, and with normal chest imaging, have worsening pulmonary function associated with silica exposure. Similarly, he treated appellant on February 24, 2020 for symptoms consistent with chronic rhinosinusitis, which developed after he was exposed to substantial amounts of cinder block dust while at work. Dr. Cohen noted that a May 16, 2019 paranasal sinus CT scan demonstrated mucosal thickening of his ostial meatus complexes bilaterally and opacification of his right frontoethmoidal recess and anterior ethmoid cavities bilaterally. He opined that these findings were consistent with hindered mucociliary clearance. Dr. Cohen further noted studies of workers from the World Trade Center revealed that exposure to aerosolized particulate debris hindered mucociliary clearance and could contribute to chronic rhinosinusitis.

The Board finds that the reports of Drs. Lyon and Cohen, when read together, are sufficient to require further development of the medical evidence to see that justice is done.[16] Drs. Lyon and Cohen are Board-certified physicians in pulmonology and otolaryngology, respectively, and are

[12] *See T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[13] *J.F.*, Docket No. 18-0492 (issued January 16, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[14] *A.M.*, Docket No. 18-0562 (issued January 23, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

[15] *E.W.*, *supra* note 9; *Gary L. Fowler*, 45 ECAB 365 (1994).

[16] *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *X.V.*, Docket No. 18-1360 (issued April 12, 2019).

qualified in their field of medicine to render rationalized opinions on the issue of causal relationship. They relied upon a proper history of injury and provided a pathophysiological explanation as to how the accepted factors of his federal employment were sufficient to have caused the diagnosed conditions. The Board has long held that it is unnecessary that the evidence of record in a case be so conclusive as to suggest causal connection beyond all reasonable doubt. Rather, the evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound, and logical.[17]

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[18]

On remand OWCP shall refer appellant, a statement of accepted facts, and the medical record to a specialist in the appropriate field of medicine. The chosen physician shall provide a rationalized opinion as to whether the diagnosed conditions are causally related to the accepted factors of appellant's federal employment. If the physician opines that the diagnosed conditions are not causally related, he or she must explain, with rationale, how or why the opinion differs from that of Drs. Lyon and Cohen. After 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.

[17] *C.C.*, Docket No. 18-1453 (issued January 28, 2020).

[18] *K.P.*, Docket 18-0056 (issued January 27, 2020); *see also A.P.*, Docket No. 17-0813 (issued January 3, 2018).

ORDER

IT IS HEREBY ORDERED THAT the March 31, 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: February 9, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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