

File Number:  
HR11-D-H

U.S. DEPARTMENT OF LABOR

RECEIVED FEB 27 2015

FEB 20 2015

OFFICE OF WORKERS' COMP PROGRAMS  
PO BOX 8300 DISTRICT 50  
LONDON, KY 40742-8300  
Phone: (202) 693-0045

Date of Injury:  
Employee:

Dear Ms.

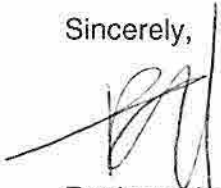
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A preliminary review has been completed, and it has been determined that the case is not in posture for a hearing at this time. The decision of the District Office has been vacated and returned to the district office for further action as explained in the attached Remand Order.

Your case file has been returned to the Jacksonville District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR  
OFFICE OF WORKERS' COMP PROGRAMS  
PO BOX 8300 DISTRICT 6 JAC  
LONDON, KY 40742-8300

Sincerely,



Rashawnda Snell  
Hearing Representative

PAUL H. FELSER  
ATTORNEY  
PO BOX 10267  
SAVANNAH, GA 31412

*If you have a disability (a substantially limiting physical or mental impairment), please contact our office/claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations and modifications.*

U.S. DEPARTMENT OF LABOR  
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of  
Claimant; Employed by the  
Case No. \_\_\_\_\_

Merit consideration of the case file was completed in Washington, D.C. Based on this review, the decision of the District Office dated August 6, 2014, is VACATED for the reasons set forth below.

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The issue for consideration is whether the claimant sustained an injury or condition as a result of his employment on \_\_\_\_\_

On \_\_\_\_\_, the claimant, \_\_\_\_\_ a \_\_\_\_\_, born \_\_\_\_\_, filed a notice of traumatic injury claiming that her asthma was affected by the waxing process on \_\_\_\_\_. Various statements, a disability statement and the agency's \_\_\_\_\_ challenge letter were received.

Following development of the record evidence, the District Office, in an August 6, 2014 decision, denied the claim finding that there was not sufficient medical evidence containing a diagnosis in relation to the injury and/or work event(s). The claimant disagreed with the decision and requested a hearing with an OWCP representative.

I find that additional development of the record evidence is warranted.

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of proof to establish the essential elements of his claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitations period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>1</sup> 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.<sup>2</sup>

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is

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<sup>1</sup> *Robert Broome*, 55 ECAB\_\_ (Dkt. No. 04-93, iss'd February 23, 2004); *see also Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>2</sup> *Phillip L. Barnes*, 55 ECAB\_\_ (Dkt. No. 02-1441, iss'd March 31, 2004); *Gary J. Watling*, 52 ECAB 357 (2001).

that the employee actually experienced the employment incident which is alleged to have occurred.<sup>3</sup> The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.<sup>4</sup>

Congress, in providing a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relation. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>5</sup>

The phrase while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers compensation law of arising out of and in the course of employment.<sup>6</sup>

The Office denied the claim explaining that the claimant had not provided medical evidence to consider an injury, condition or diagnosis as a result of the employment. The agency, however, has presented evidence and argument challenging the claimant's account of the claimed work exposure on [redacted]. The agency provided witness statements in support of its argument that there was no waxing ongoing on the claimed incident date. The agency also provided documentation regarding wax schedule indicating that there was no waxing on [redacted]. The agency has presented sufficient evidence to question the claimed factual basis of the claim and there is no indication of the fact(s) or work event(s) accepted by the Office for further review of the claim.

While the Office rightfully explained that there was a lack of medical evidence to consider a [redacted] as a result of the employment, the factual basis of the claim is unclear, specifically, whether the evidence establishes a work-place exposure on [redacted] as claimed.

The initial question presented is a factual question as to whether: (1) there was some type of exposure; and (2) whether it occurred at work. Although this is a factual issue, clearly the medical evidence may be pertinent both in confirming the alleged factual circumstances as well as providing an opinion on the occurrence of an exposure.<sup>7</sup> I do not find that the record is clear in addressing or developing the facts in the claim to

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<sup>3</sup> *Linda S. Jackson*, 49 ECAB 486 (1998); *See Louise F. Garnett*, 47 ECAB 639 (1996); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

<sup>4</sup> *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

<sup>5</sup> *Mary Kokich*, 52 ECAB 239, 240 (2001).

<sup>6</sup> *Kathryn A. Tuel-Gillem*, 52 ECAB 451, 452-53 (2001). In addressing this issue, the Board has stated that to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto. *See id.*


<sup>7</sup> *See Edward P. Prior*, 45 ECAB 288 (1994) (harm from a neutral risk, one in which the cause itself or the character of the cause was simply unknown, is compensable).

establish a factual basis for acceptance of a workplace exposure to further consider the medical condition or causal relationship of a condition and the employment.

Prior to further review on appeal, I find that the Office must address and clearly identify the fact(s) in the claim on which the claimed exposure was established and accepted by the Office. The agency submitted comments challenging the claim, however, there was no discussion of the agency's argument related to the facts in the claim other than indicating that the agency's argument had been received. Following clarification of the facts in the record and any further development considered necessary, the Office should provide the claimant with a new decision regarding a work-related injury, as claimed.<sup>8</sup>

Consistent with the above findings, the District Office's August 6, 2014 decision is set aside and the case is **remanded** for further development of the issue of fact of injury.

Dated: FEB 20 2015  
Washington, D.C.



Rashawnda L. Snell  
Hearing Representative  
for  
Director, Office of  
Workers' Compensation Programs

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<sup>8</sup> It is noted that the claimant has four additional claims for asthma attacks as a result of the employment reviewed under claims 062322088, 062322199, 062326067 and 062334027.