IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

David Bourke	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. 20-cv-4427
	)	
United States of America,	)	*(Judge Alonso)*
	)	
Defendants.	)	

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

The Government asks the Court to dismiss this case for lack of jurisdiction under Rule 12(b)(1) and as being time barred, and thus subject to dismissal under Rule 12(b)(6). (Motion to Dismiss, ECF No. 6.) Plaintiff answers the jurisdictional arguments below and demonstrates that, as in *United States v. Park*, 389 F. Supp. 3d 561, 578 (N.D. Ill. 2019), the Court should not entertain the statute of limitations affirmative defense at the pleading stage.

I. Facts

Plaintiff David Bourke was exposed to chemical fumes in the course of his employment for the Veterans Administration. (Decision of the Employees Compensation Appeals Board, Exhibit 1 at 2.) Plaintiff mistakenly believed that this exposure was the cause of "multiple medical conditions" and sought compensation under the Federal Employees' Compensation Act

(FECA). *Id.* Plaintiff did not receive any compensation because the Secretary of Labor found that the chemical exposure had not caused any harm. *Id.* at 5-6.

On January 27, 2020, the Secretary of Labor made the final decision that the chemical exposure had not caused any workplace injury. (Decision of the Employees Compensation Appeals Board, Exhibit 1.)

The finding by the Secretary of Labor that the chemical exposure was not a workplace injury cannot be reviewed by the Court. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 780 & n. 13 (1985). The Court must therefore reject the Government's repeated assertion that this case involves "workplace injuries." (Motion to Dismiss, ECF No. 6, ¶ 1; Memorandum in Support of Motion to Dismiss, ECF No. 7 at 1, 2, 4, and 5.) On the contrary, this is a case where a government employee mistakenly believed that he had incurred workplace injuries, but where it has now been conclusively determined that the employee was wrong because there is no "causal relationship between appellant's federal employment duties and his diagnosed conditions." (Decision of the Employees Compensation Appeals Board, Exhibit 1 at 6.)

Plaintiff's claim is for medical malpractice not workplace injuries. Plaintiff received much of the treatment for his medical conditions (that

were not caused by a workplace injury) at VA Hospitals: From March 30, 2014 through October 12, 2017, plaintiff was treated by "various physicians" at the Hines VA Hospital.[1] (Decision of the Employees Compensation Appeals Board, Exhibit 1 at 2-3.) Plaintiff alleges that while providing medical treatment,

> The health care providers breached the appropriate standard of care in one or more the following:
>
> 1. Misdiagnosed the nature of plaintiff's medical condition;
> 2. Failed to advise plaintiff of the risks, dangers, and side effects of prescribing steroids;
> 3. Prescribed inappropriate medication at an excessive dosage; and
> 4. Failed to monitor plaintiff's blood levels, which would have indicated that the improper medication has been prescribed at an excessive level for too long.

(Complaint, ¶ 10, ECF No. 1.)

On January 31, 2020, the U.S. Department of Veteran Affairs made its final determination of plaintiff's Federal Tort Claim Act (FTCA) claim complaining about the alleged medical malpractice. (Defendant's Exhibit 6, ECF No. 7-2 at 33.) Plaintiff timely filed this action on July 28, 2020. (ECF No. 1.)

[1] Plaintiff alleged in his complaint that he had "received medical treatment at the Hines VA Hospital in 2015." (Complaint, ECF No. 1, ¶ 9.)

II. The Court Has Jurisdiction

The linchpin of the government's jurisdiction argument is its erroneous view that this is a case about medical malpractice "in treating [plaintiff's] workplace injuries." (Memorandum in Support of Motion to Dismiss, ECF No. 7 at 4.) This is incorrect. The Secretary of Labor has conclusively determined that plaintiff did not suffer workplace injuries. Plaintiff cannot and does not challenge this determination. Nothing in the FECA bars FTCA claims for medical malpractice when the treatment was not provided for a workplace injury.

The FECA applies to a federal employee claiming "personal injury sustained while in the performance of his duty." 5 U.S.C. § 8102(a). When FECA applies, the statute bars standalone medical malpractice claims against federal providers for treatment "with respect to the injury or death of an employee." 5 U.S.C. § 8116(c). The "FECA creates a quid pro quo—federal employees receive compensation for work-related injuries without having to prove fault, and in exchange, they lose the right to sue their government employer in tort." *Williamson v. United States*, 862 F.3d 577, 580 (6th Cir. 2017). This trade-off extends to medical malpractice claims of federal employees that involve treatment of the work-related injury:

> As a fundamental tort principle, injury caused by medical malpractice in the treatment of a previous, negligently caused injury is proximately caused by—and therefore occurs "because

> of"—the original underlying negligence. *See, e.g.*, Restatement (Second) of Torts § 457 cmt. a (Am. Law Inst. 1965). As Learned Hand explained, the common-law negligence rule is that "the initial wrong is the cause of all that follows, even when there has intervened a succeeding negligent act that produced the aggravation." *Balancio v. United States*, 267 F.2d 135, 137 (2d Cir. 1959).

Williamson, 862 F.3d at 581. Although the Seventh Circuit does not appear to have directly addressed this question, decisions in other circuits are in accord, holding that the FECA bars claims of medical malpractice that arise out of the workplace injury. *See, e.g.*, *Spinelli v. Goss*, 446 F.3d 159, 161 (D.C. Cir. 2006); *Gold v. United States*, 387 F.2d 378, 379 (3d Cir. 1967); *Vander v. U.S. Dept. of Justice*, 268 F.3d 661, 664 (9th Cir. 2001); *Noble v. United States*, 216 F.3d 1229, 1235–36 (11th Cir. 2000).

This rule does not apply here because the Secretary of Labor has conclusively determined that the injury for which plaintiff received treatment—treatment that included medical malpractice—was not caused by a workplace injury. The Court should reject the government's argument that an unsuccessful claim under the FECA for workplace injuries bars any claim for medical malpractice in treating an injury when, as in this case, the employee is mistaken in asserting that the injury was work-related.

It is well-established that the FECA does not apply to claims by an injured federal employee where the injury was not sustained while in the performance of his duty. *Wright v. United States*, 717 F.2d 254, 278 (6th Cir.

1983); *Wallace v. United States*, 669 F.2d 947, 952 (4th Cir. 1982); *United States v. Udy*, 381 F.2d 455, 458 (10th Cir. 1967).

The government cites *Fuqua v. United States Postal Serv.*, 956 F.3d 961 (7th Cir. 2020), an easily distinguishable case to support its position. (Memorandum in Support of Motion to Dismiss, ECF No. 7 at 6-7.) The question at issue in *Fuqua* was "under which federal employee compensation act a postal worker's claim of emotional distress must be resolved." *Fuqua*, 956 F.3d at 962. Mr. Fuqua claimed that he suffered emotional distress because he had been fired for refusing to accept reassignment to a new location. *Id.* The Secretary of Labor asked Mr. Fuqua to present additional documentation that he "had been diagnosed with a condition from an employment activity, or was injured while performing any duty of his employment." *Id.* at 963. Mr. Fuqua did not present any additional documentation and the Secretary denied his claim. *Id.* Mr. Fuqua then litigated his claim for emotional distress under the FTCA; the district court dismissed for lack of jurisdiction and the Court of Appeals affirmed:

> Although a federal employee may receive benefits under the Federal Employees' Compensation Act for job-related mental distress, such a claim cannot be maintained under the Federal Tort Claims Act when the FECA applies.

Fuqua, 956 F.3d at 965.

As viewed by the Seventh Circuit, the Secretary implicitly determined that Mr. Fuqua's emotional distress claim was covered by the FECA but denied relief because of insufficient evidence. *Fuqua*, 956 F.3d at 964-65. There was no claim in *Fuqua* that a government employed physician committed malpractice in treating the emotional distress; the only claim in *Fuqua* was that the plaintiff had suffered emotional distress when he was fired for refusing to accept reassignment to a new location. *Fuqua*, 956 F.3d at 962.

Plaintiff does not contend that he was injured by the chemical exposure that was the core of his FECA claim. Plaintiff's claim in this case is that he was injured by the malpractice of the government employed physicians who treated him between 2014 and 2017. This is not a case where the medical malpractice occurred during "the treatment of a previous, negligently caused injury," *Williamson*, 862 F.3d at 581, that is covered by the FECA. Nor is this a case where the Secretary concluded that the medical malpractice occurred during plaintiff's employment.

The government asserts that in adopting the FECA, Congress "took away the right" of government employees "to sue the government in tort for medical malpractice actions" when, as in this case, the malpractice was committed in the course of treating an injury that is not covered by the

FECA. (Memorandum in Support of Motion to Dismiss, ECF No. 7 at 7.) The government is unable to cite any authority for this Draconian rule and is unable to point to any language in the statute that supports this illogical and unjust result. The Court should therefore deny the government's motion to dismiss for lack of jurisdiction.

III. The Statute of Limitations Defense Should Not Be Resolved on a Rule 12(b)(6) Motion to Dismiss

The government asserts that this case is governed by the Illinois limitations statute set out in 735 ILCS 5/13-212(a). (Memorandum in Support of Motion to Dismiss, ECF No. 7 at 8.) This statute requires that a medical malpractice case be brought within 2 years of discovery of the injury or death, but not more than 4 years after the "act or omission or occurrence alleged in such action to have been the cause of such injury or death."[2] 735 ILCS 5/13-212(a).

Illinois law "allows the four-year limit to be tolled by the doctrine of fraudulent concealment." *Augutis v. United States*, 732 F.3d 749, 753 (7th Cir. 2013), quoting *DeLuna v. Burciaga*, 223 Ill.2d 49, 857 N.E.2d 229, 243–

[2] The Seventh Circuit held in *Augutis v. United States*, 732 F.3d 749 (7th Cir. 2013) that the Illinois statute of repose is not "preempted by the FTCA's own procedural scheme." *Id.* at 753. Plaintiff acknowledges that this Court must follow the Seventh Circuit. To preserve this issue for potential appellate review, plaintiff notes that other court have criticized *Augutis* as inconsistent with the FTCA. *See, e.g., John Doe VE v. United States.*, 17-2331, 2017 WL 4516864, at *3 (D. Kan. Oct. 10, 2017) (collecting cases).

44 (2006). Moreover, as summarized by the district court in *Crenshaw v. United States*, 17-2304, 2020 WL 5579180 (C.D. Ill. Mar. 24, 2020):

> The Illinois Supreme Court has ruled that an "occurrence" of negligent medical care "may include a continuing *negligent* course of treatment for a specific condition." *Cunningham v. Huffman*, 609 N.E.2d 321, 324 (Ill. 1993) (emphasis in original). The Illinois Supreme Court held that to delay the four-year statute of repose the plaintiff must demonstrate "that there was an ongoing course of continuous *negligent* medical treatment." *Cunningham*, 609 N.E.2d at 325 (emphasis in original). "... [A] plaintiff must demonstrate: (1) that there was a continuous and unbroken course of negligent treatment, and (2) that the treatment was so related as to constitute one continuing wrong." *Id.* If the defendant discovers the negligent care and informs the plaintiff about it, then the four-year clock starts running. *Id.* at 326. [footnote omitted]

Crenshaw v. United States, 2020 WL 5579180 at *13.

Plaintiff does not allege any discrete act of medical malpractice that triggered the four-year statute of repose. Plaintiff alleges that he "received medical treatment at the Hines VA Hospital in 2015 from physicians and medical personnel (hereinafter 'health care providers') employed by the United States." (Complaint, ¶ 10, ECF No. 1.) The Employees Compensation Appeals Board (Exhibit 1) found that plaintiff had been treated at a VA Hospital from 30, 2014 through October 12, 2017. (Exhibit 1 at 2-3.)

As this Court recognized in *United States v. Park*, 389 F. Supp. 3d 561 (N.D. Ill. 2019), plaintiff "was not required to anticipate this affirmative defense in drafting its complaint, and a district court should not dismiss a claim

as time-barred at the pleading stage unless the plaintiff has 'admitted all the ingredients of an impenetrable [statute of limitations] defense.'" (citations omitted) *Id.* at 578. Plaintiff has not had an opportunity to prove fraudulent concealment that would toll the four-year statute of appeal; nor does plaintiff allege that the continuing negligent treatment ended more than four years before plaintiff filed this action. Thus, as in *Park*, the statute of limitations defense should not be resolved on a Rule 12(b)(6) motion to dismiss.

Application of a statute of limitations defense to bar plaintiff's medical malpractice claim would be especially inappropriate when he did not have a cause of action until January 27, 2020, when the Employees Compensation Appeals Board concluded that plaintiff had not received injuries during a workplace accident and thereby vested the district court with jurisdiction to hear and decide plaintiff's FTCA claim. This is akin to a prisoner who seeks to challenge a criminal conviction but must wait "until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus." *Heck v. Humphrey*, 512 U.S. 477, 489 (1994).

IV. Conclusion

The Court should therefore deny the motion to dismiss.

Respectfully submitted,

/s/ Kenneth N. Flaxman
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Exhibit 1

United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 19-0514**
	)	**Issued: January 27, 2020**
DEPARTMENT OF VETERANS AFFAIRS, EDWARD HINES, JR. VETERANS ADMINISTRATION MEDICAL CENTER, Hines, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On January 8, 2019 appellant, through counsel, filed a timely appeal from an August 30, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the 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.

[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.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish lung conditions causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On July 25, 2017 appellant, then a 60-year-old reproduction equipment operator, filed an occupational disease claim (Form CA-2) alleging multiple medical conditions as a result of being exposed to chemical fumes due to factors of his federal employment. He indicated that he first became aware of his conditions, and their relationship to factors of his federal employment, on October 21, 2014.

In a narrative statement dated July 25, 2017, appellant indicated that on September 3 and 11, 2014 he was exposed to hazardous roofing material chemicals, which came through the air conditioning system and into his employment duty station. He noted that he left work on September 11, 2014 for medical examination. Appellant subsequently felt ill in the days after exposure and sought medical treatment from his primary physician on September 30, 2014. He related that a scan of his lungs revealed a number of noncalcified growths sprouting in both lungs. Appellant indicated that he began experiencing severe pain in his lower intestines on March 5, 2015 and was diagnosed with infectious colitis. He noted that he was hospitalized and then placed on a steroid medication for his lung disease, which had been diagnosed as sarcoidosis. Appellant noted that the steroid medication caused side effects including a collapsed left lung and dangerously low levels of oxygen. He also noted that, subsequent to filing the Form CA-2, he also suffered from blood poisoning, bronchitis, a fractured back from repetitive coughing, a left-sided hernia, and had major corrective spinal surgery all of which he attributed to the chemical exposure in March 2014.

In a development letter dated August 9, 2017, OWCP advised appellant of the deficiencies of his claim. It provided a questionnaire for his completion and informed him of the medical evidence needed to establish his claim. OWCP afforded appellant 30 days to submit the necessary evidence.

In response to OWCP's development letter, on August 14, 2017 OWCP received approximately 100 separate diagnostic examination reports ranging from December 17, 2008 to July 1, 2016 regarding appellant's lung conditions.

In addition, OWCP received approximately 40 separate medical reports with dates ranging from March 30, 2014 to October 28, 2016 from various physicians at the Veterans Administration (VA) Hospital in Hines, IL including: a report dated March 30, 2014 from Dr. Hameeda Shaikh, a Board-certified pulmonologist; a report dated February 24, 2015 from Dr. Michael Eng, a Board-certified cardiothoracic surgeon; reports dated April 7, 2015 from Dr. John Santaniello, a Board-certified general surgeon, and Dr. Michael Sprang, a Board-certified gastroenterologist; a report dated April 21, 2015 from Dr. Jennifer Plitcha, a Board-certified general surgeon; a report dated May 19, 2015 from Dr. Usman Khan, a Board-certified pulmonologist; a report dated August 26, 2015 from Dr. Ambrose Panico, an osteopath; a report dated September 15, 2015 from Dr. William W. Ashley, a Board-certified neurosurgeon; a report dated December 8, 2015 from

Dr. Linda Chan, a Board-certified pulmonologist; a report from Dr. Raj Uppal, an anesthesiology specialist; multiple reports dated February 1 through 16, 2016 from Dr. Teng Moua, a Board-certified pulmonologist; reports dated February 2 and 17, 2016 from Dr. Robert A. Werners, a Board-certified endocrinologist; reports dated February 4, 2015 and June 9, 2016 from Dr. Brian E. Grogg, Board-certified in physical medicine and rehabilitation; a report dated February 4, 2016 from Dr. Amy E. Rabatin, Board-certified in physical medicine and rehabilitation; multiple reports dated February 19 through April 15, 2016 from Dr. Michael Frett, a pain management specialist; a report dated May 15, 2016 from Dr. W. Richard Marsh, a Board-certified neurosurgeon; a report dated May 18, 2016 from Dr. Jeremy L. Fogelson, a Board-certified neurosurgeon; a report dated June 17, 2016 from Dr. Stephen J. Johans, a Board-certified neurosurgeon; a report dated June 29, 2016 from Dr. Jerry Bauer, a Board-certified neurosurgeon; and a report dated October 28, 2016 from Dr. Frank Laghi, a Board-certified pulmonologist. These physicians collectively diagnosed the following conditions: lung nodules, chronic back pain, degenerative disc disease, steroid-induced osteoporosis with fracture, steroid-induced testicular hypofunction, infectious colitis, enteritis, gastritis, blood poisoning, sleep apnea, and rheumatic disorders of both mitral and tricuspid valves. Each physician reviewed appellant's history of injury and diagnostic reports, performed a physical examination, and diagnosed a variety of conditions.

In a report dated February 16, 2016, Dr. Moua indicated that he could not provide a definitive diagnosis as to whether the lung nodules were sarcoidic in nature, and noted that, even if the nodules were sarcoidic, the brief exposures on September 9 and 11, 2014 could not have caused them.

OWCP reviewed the medical records submitted and undertook further development of the claim. In a new development letter dated September 21, 2017, it advised appellant of the deficiencies of his claim, notified him of the type of additional evidence needed to establish his claim, and provided a questionnaire for his completion. Appellant was informed of the medical evidence necessary to establish his claim. OWCP afforded him 30 days to respond.

On October 17, 2017 OWCP received 83 separate medical reports, dated August 26, 2015 to October 12, 2017, from a number of physicians at the VA Hospital in Hines, IL, including: a report dated August 26, 2015 from Dr. Keith Burgard, an internal medicine specialist; multiple reports dated September 14, 2015 through September 26, 2017 from Dr. Farah A. Meah, a Board-certified endocrinologist; a report dated February 19, 2016 from Dr. Kaya Shah, a pain management specialist; multiple reports dated March 7, 2016 through June 2, 2017 from Dr. Laghi; a report dated March 25, 2016 from Dr. Arslan Zaidi, a pain management specialist; a report dated April 15, 2016 from Dr. Sara Strowd, a pain management specialist; a report dated June 21, 2016 from Dr. Yvonne Lucero, a physical medicine and rehabilitation specialist; multiple reports dated August 25, 2016 through March 16, 2017 from Dr. Michael Wernhoff, a Board-certified neurosurgeon; a report dated August 28, 2016 from Dr. Edward C. Villa, an emergency medicine specialist; a report dated September 23, 2016 from Dr. Bruce E. Lewis, a Board-certified neurosurgeon; a report dated November 26, 2016 from Dr. Stephen Roberts, a Board-certified neurosurgeon; a report dated December 3, 2016 from Dr. Swathi Chidambaram, a Board-certified neurosurgeon; a report dated December 13, 2016 from Dr. John S. Wheeler, a Board-certified neurosurgeon; two reports dated September 20, 2017 from Dr. Kevin Swong, a Board-certified neurosurgeon, and Dr. Matthew Kominsky, a pain management specialist; two reports dated October 11 and 12, 2017 from Dr. Wermers; a report dated October 12, 2017 from Dr. Grogg; and

two reports dated October 12 and 30, 2017 from Dr. Moua. These physicians provided examination findings including the previously listed diagnoses.

In his October 12 and 30, 2017 reports, Dr. Moua indicated that he was provided with the material safety data sheet for the chemical exposure and that it was not likely that one exposure could be the cause of appellant's pulmonary condition. In addition, he diagnosed nodules with unknown etiology and could not definitively choose between the possible causes of granulomatous infection or inflammation, sarcoidosis, or inhalation injury.

By decision dated January 11, 2018, OWCP denied appellant's occupational disease claim finding that the evidence of record failed to establish that his diagnosed conditions were causally related to the accepted factors of his federal employment.

On January 22, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. He submitted two diagnostic reports dated October 21, 2014 and December 18, 2015 along with his request.

On June 26, 2018 a hearing was held before an OWCP hearing representative.

By decision dated August 30, 2018, OWCP's hearing representative affirmed OWCP's January 11, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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,[4] 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.[5] 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.[6]

In an occupational disease claim, to establish that an injury was sustained in the performance of duty, 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

[3] *Supra* note 2.

[4] *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

[6] *A.M.*, *supra* note 4; *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).

disease or condition;[7] (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[8] and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[9]

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.[10] 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 employee.[11] 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.[12]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish lung conditions causally related to the accepted factors of his federal employment.

In support of his occupational disease claim, appellant submitted a total of 288 medical reports dated February 13, 2014 to October 12, 2017. These reports indicated appellant's diagnosed conditions, which included: lung nodules, chronic back pain, degenerative disc disease, steroid induced osteoporosis with fracture, steroid-induced testicular hypofunction, infectious colitis, enteritis, gastritis, blood poisoning, sleep apnea, and rheumatic disorders of both mitral and tricuspid valves. However, none of these reports included a narrative medical opinion regarding the cause of appellant's diagnosed conditions. The Board has held that medical evidence which does not offer an opinion on causal relationship is of no probative value to the issue of causal relationship.[13] Therefore, these reports are insufficient to establish appellant's claim.

The only physician of record who addressed causal relationship was Dr. Moua. In his reports dated October 12 and 30, 2017, Dr. Moua opined that he could not definitely identify the

[7] *C.C.*, Docket No. 18-1229 (issued March 8, 2019); *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[8] *K.C.*, Docket No. 19-1185 (issued November 12, 2019); *R.A.*, Docket No. 16-1218 (issued November 10, 2016); *Michael R. Shaffer*, 55 ECAB 386 (2004).

[9] *Id.*

[10] *A.M.*, Docket No. 18-0685 (issued October 26, 2018).

[11] *E.V.*, Docket No. 18-0106 (issued April 5, 2018).

[12] *A.M.*, *supra* note 10; *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[13] *See L.T.*, Docket No. 18-1603 (issued February 21, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

etiology or cause of appellant's conditions. As Dr. Moua's opinion is equivocal and speculative in nature, it is insufficient to establish appellant's claim.[14]

On appeal counsel asserts that appellant has met his burden of proof to establish that his diagnosed lung conditions are causally related to the accepted factors of his federal employment. He does not, however, cite to a rationalized medical report on the issue of causation. As explained above, the Board finds that the record lacks rationalized medical evidence establishing causal relationship between appellant's federal employment duties and his diagnosed conditions. For this reason, the Board finds that appellant has not met his burden of proof to establish his claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish lung conditions causally related to the accepted factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the August 30, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 27, 2020
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

[14] *M.M.*, Docket No. 19-0061 (November 21, 2019); *D.R.*, Docket No. 17-0971 (issued October 5, 2017).