

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOZEF MAGYAR and DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD, Long Beach, Calif.

*Docket No. 97-187; Submitted on the Record;
Issued October 13, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
A. PETER KANJORSKI

The issues are: (1) whether appellant established that he suffered from asbestosis as a result of his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in approving attorney's fees in the amount of \$897.00.

The Board has duly reviewed the case record and concludes that appellant has not established that he suffered from asbestosis as a result of his federal employment.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition, for which compensation is claimed;¹ (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;² and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition, for which compensation is claimed³ or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁴

¹ See *Ronald K. White*, 37 ECAB 176 (1985).

² See *Walter D. Morehead*, 31 ECAB 188 (1979).

³ See *Arthur C. Hamer*, 1 ECAB 63 (1947).

⁴ See generally *Lloyd C. Wiggs*, 32 ECAB 1023 (1981).

In the present case, appellant has failed to submit any evidence establishing that he suffers from asbestosis causally related to his federal employment. Dr. Harmohinder S. Gogia, a physician Board-certified in pulmonary diseases, provided the only medical opinion evidence.⁵ On June 8, 1995 Dr. Gogia reviewed appellant's history and conducted a physical examination. He also reviewed an April 26, 1995 x-ray and noted that it showed no evidence of infiltrates, mass densities, pleural plaquing, or fibrosis. He did, however, indicate that a pulmonary function study revealed evidence of mild restrictive lung disease. He concluded that this was caused by asbestos.

Pursuant to the Office's request for a clarifying opinion, Dr. Gogia stated on July 21, 1995 that appellant's mild restrictive lung disease could be attributed to obesity, but that it was more likely related to appellant's 15 to 20 years exposure to asbestos. Dr. Gogia, however, recommended that a computerized axial tomography (CAT) scan of appellant's lungs be taken to find evidence of the early stages of asbestosis. Subsequently, Dr. Jason, Lui, a Board-certified radiologist, interpreted a CAT scan of appellant's lungs as normal and noted no evidence of asbestosis such as pleural thickening, pleural calcification, or apical scarring. As a result of this testing, Dr. Gogia issued a final report on September 15, 1995 opining that appellant showed no evidence of asbestosis caused by parenchymal injury. Because the record is devoid of any medical opinion evidence diagnosing asbestosis causally related to appellant's federal employment, appellant did not meet his burden of proof and the Office properly rejected appellant's claim in its decision dated September 22, 1995.

The Board also finds that the Office did not abuse its discretion in approving attorney's fees in the amount of \$897.00.

It is not the Board's function to determine the fee for representative services performed before the Office. That is a function within the discretion of the Office based on the criteria set forth in 20 C.F.R. § 10.145 and mandated by Board decisions. The Board's sole function is to determine whether the action by the Office constituted an abuse of discretion.⁶ The criteria governing the approval of fees for a representative's services are provided in 20 C.F.R. § 10.145(b) which states:

“(b) The fee approved by the Office will be determined on the basis of the actual necessary work performed and will generally include but are not limited to the following factors:

- (1) [U]sefulness of the representative's services to the claimant.
- (2) The nature and complexity of the claim.
- (3) The actual time spent on development and presentation of the claim.

⁵ Although appellant received treatment for breathing problems prior to his examination, none of the treating physicians provided an opinion diagnosing appellant's condition and addressing the relationship of the condition to appellant's federal employment. The Office, therefore, referred appellant to Dr. Gogia.

⁶ *Russell Thomason*, 35 ECAB 781 (1984).

- (4) The amount of compensation accrued and potential future payments.
- (5) Customary local charges for similar services.
- (6) Professional qualifications of the representative.”

The Office properly considered all the criteria set out at 20 C.F.R. § 10.145(b) in its May 30, 1996 decision awarding a fee of \$897.00. As noted above, the Board’s sole function is to determine whether the action taken by the Office in the matter of the attorney’s fee constituted an abuse of discretion. Abuse of discretion is generally shown through manifest error, clearly unreasonable exercise of judgment, or actions taken, which are contrary to both logic and probable deductions from known facts.⁷ There is no evidence in this case that the Office abused its discretion in approving these attorney’s fees.

The decisions of the Office of Workers’ Compensation Programs dated May 30, 1996 and September 22, 1995 are affirmed.

Dated, Washington, D.C.
October 13, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

A. Peter Kanjorski
Alternate Member

⁷ *Daniel J. Perea*, 42 ECAB 214 (1990).