U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT V. HENRY and DEPARTMENT OF THE ARMY, LETTERKENNY ARMY DEPOT, Chamersburg, PA

Docket No. 01-829; Submitted on the Record;
Issued October 26, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant developed asbestosis while in the performance of duty.

On August 9, 2000 appellant, then a 59-year-old carpenter and blocker-bracer, filed a notice of occupational disease alleging that he developed asbestosis as a result of asbestos exposure.[1] In a decision dated January 19, 2001, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that fact of injury was not established.

The Board has duly reviewed the entire case record on appeal and finds that appellant has not established that he developed asbestosis while in the performance of duty.

A person who claims benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim, including that he sustained an injury while in the performance of duty and that he had disability as a result.[3] In accordance with the Federal (FECA) Procedure Manual, to determine whether an employee actually sustained an injury in the performance of his duty, the Office begins with the analysis of whether "fact of injury" has been established. Generally, "fact of injury" consists of two components which must be considered in conjunction with the other.

The first component to be established is that the employee actually experienced the employment incident or exposure which is alleged to have occurred.[4] In order to meet his burden of proof to establish the fact that he sustained an injury in the performance of duty, an

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[1] At the time he filed his claim, appellant was on leave due to an unrelated claim.

[2] 5 U.S.C. §§ 8101-8193.

[3] *Charles E. Evans*, 48 ECAB 692 (1997); *see* 20 C.F.R. § 10.110(a).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

employee must submit sufficient evidence to establish that he actually experienced the employment injury or exposure at the time, place and in the manner alleged.

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[5] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[6] The belief of the claimant that a condition was caused or aggravated by the employment is not sufficient to establish a causal relationship.[7]

In this case, the Office accepted that appellant submitted sufficient factual information to establish that from July 1981 to May 2000, while working as a carpenter and blocker-bracer, he was routinely exposed to asbestos-covered heat pipes, roofs, ceilings and floors at the time, place and in the manner alleged. Therefore, the only issue is whether appellant sustained an injury as a result of the employment exposure.

In support of his claim, appellant submitted the results of pulmonary functions tests performed at the employing establishment in 1984, 1985, 1987, 1988, 1989, 1990, 1994, 1996 and 2000. In each case the test results were interpreted by a physician as compatible with the presence of a mild or moderate obstructive airways defect.

Because appellant had never smoked and did have some evidence of airways disease, the Office referred appellant, a statement of accepted facts and a list of questions to be answered to Dr. Jose R. Acosta for a second opinion.

In his report dated November 21, 2000, Dr. Acosta reviewed his findings on physical examination, as well as the results of a chest x-ray, a computerized tomography scan and a lung function study performed at his request. Dr. Acosta concluded that, while appellant had a 19-year history of asbestos exposure, he was "completely asymptomatic" and had "no clinical or radiographic evidence of asbestosis" on physical examination.

The physician specifically noted that appellant had evidence of small airways disease, but no opacities of the lung, normal heart size, no evidence of pleural calcifications, plaque, or pleural effusions, and no parenchymal abnormality. Dr. Acosta further stated that "although asbestos usually affects primarily lung parenchyma and pleura, the presence of small airways disease in this patient who has never smoked could still be due to asbestos exposure since airway disease due to peribronchial fibrosis has been previously described in asbestos workers." Dr. Acosta concluded that appellant should have long-term follow-up with annual pulmonary function tests and chest x-rays.

[5] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(a)(15), 10.5(a)(16) ("traumatic injury" and "occupational disease" defined).

[6] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[7] *Charles E. Evans*, *supra* note 3.

On November 28, 2000 the Office asked an Office medical adviser to comment on Dr. Acosta's statement that appellant's small airways disease could be due to asbestos exposure. In a statement dated January 3, 2001, the Office medical adviser stated that appellant had no evidence of asbestos-related disease at this time. While the medical adviser agreed with Dr. Acosta that small airways disease has been described in people with asbestos exposure and no smoking history, he explained that, due to the absence of pleural thickening, plaques or any other signs of asbestos-related tissue reaction in appellant's lungs, attribution of appellant's small airways disease to asbestos exposure would be only speculation. The medical adviser concluded, however, that as asbestosis can have a latency period of up to 20 to 40 years, appellant may have definite evidence of asbestos-related disease at a future date.

As the record is devoid of any medical evidence to establish that appellant has asbestosis at this time, the second prong of the fact-of-injury test has not been established. Appellant has not met his burden of proof.

The decision of the Office of Workers' Compensation Programs dated January 19, 2001 is affirmed.

Dated, Washington, DC
October 26, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member