United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 06-2012**
	)	**Issued: January 23, 2007**
DEPARTMENT OF THE NAVY, PORTSMOUTH NAVAL SHIPYARD, Portsmouth, NH, Employer	)	

Appearances:
Appellant, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 5, 2006 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated May 2 and July 21, 2006. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an asbestos-related condition in the performance of duty; and (2) whether the Office properly denied appellant's request for an oral hearing before an Office hearing representative.

FACTUAL HISTORY

On June 6, 2005 appellant, a 61-year-old air conditioning equipment mechanic, filed a Form CA-2 claim for benefits, alleging that he developed an asbestos-related condition caused by factors of his employment; *i.e.*, long-term exposure to asbestos.

In support of his claim, appellant submitted voluminous records from the employing establishment indicating that he had been exposed to asbestos from 1985 to 2004. Appellant also submitted medical records demonstrating he was treated for bronchial, respiratory, cardiovascular and pleural problems during this period.

By letter dated August 25, 2005, the Office advised appellant that it required additional factual and medical evidence to determine whether he was eligible for compensation benefits. The Office asked appellant to submit a comprehensive medical report from his treating physician describing his symptoms and the medical reasons for appellant's condition and an opinion as to whether his claimed condition was causally related to his federal employment. The Office requested that appellant submit the additional evidence within 30 days.

Appellant submitted a June 19, 1997 report from Dr. Marc Wilkenfeld, Board-certified in preventive medicine. Dr. Wilkenfeld stated:

> "I have reviewed the test results and other information obtained at [appellant's] medical screening which was conducted on May 21, 1997. He is a 54-year-old male with a history of shortness of breath when rushing on level ground or walking up a slight hill. This has been present since the 1970's. The shortness of breath prevents him from keeping up with people his own age. He also complains of cough productive of yellow sputum as well as cough productive of blood streaked sputum. He also notes that he coughs up blood. He has pleuritic chest pain, difficulty swallowing, abdominal pain and recent changes in bowel habits. He also notes blood in his stools. Given the severity of his complaints, he should immediately follow up for all of these with his personal physician. He has no history of rib fracture or tuberculosis."

Dr. Wilkenfeld noted that appellant had been exposed to large amounts of asbestos while working as a pipe fitter and air conditioning mechanic since 1984. He concluded:

> "In summary, [appellant] had a history of significant occupational exposure to asbestos over many years. I believe within a reasonable degree of medical certainty that the pleural plaques detected on chest x-ray occurred as a direct result of this asbestos exposure."

In a report dated July 22, 2001, Dr. Albert J. Belli, an osteopath and a specialist in internal medicine, reviewed appellant's history of significant asbestos exposure, noted abnormal chest radiography and physical examination findings and concluded that a diagnosis of asbestos-related pleural disease was established within a reasonable degree of medical certainty. He related that spirometry findings revealed evidence of neither obstructive nor restrictive process; the flow volume loop was within normal limits. Dr. Belli reviewed a May 13, 1993 chest x-ray and stated:

> "There [was] no respiratory failure present on the lateral view. The lungs appeared free of active disease. There was no radiographic evidence of interstitial fibrosis note and no lung masses seen. However, there is pleural thickening present in both

hemothoraces, which is greater on the right side than the left. [There was] no pleural diaphragmatic calcification identified. The findings were consistent with asbestos-related pleural disease."

Dr. Belli concluded that, due to appellant's abnormal physical findings, borderline spirometry and history of shortness of breath, appellant should undergo complete pulmonary function studies in the future.

In order to determine appellant's current condition, the Office referred appellant, the medical history and a statement of accepted facts to Dr. Stephen A. Mette, Board-certified in internal medicine. In an April 19, 2006 report, he concluded that based on the physical examination, history of alleged exposure, evaluation of chest x-ray and pulmonary function tests, there was no evidence of asbestos-related lung disease. Dr. Mette noted that appellant worked as a pipefitter at a Veterans Administration Hospital in 1981 where he was exposed to asbestos. He stated that appellant was also exposed to asbestos while working at the employing establishment from 1985 through 2004. Dr. Mette indicated, however, that pulmonary function testing performed in his laboratory did not support a diagnosis of asbestosis. He stated that although appellant showed a moderate reduction in the diffusing capacity for carbon monoxide, it corrected to normal for alveolar volume; there was no restrictive impairment. In addition, appellant had no evidence of interstitial lung disease on chest radiograph restrictive impairment.

Dr. Mette concluded that there were no findings to suggest asbestosis or pleural abnormalities. He diagnosed dyspnea due to obesity and poor conditioning.

By decision dated May 2, 2006, the Office denied appellant's claim, finding that the medical evidence of record indicated that he did not sustain an asbestos-related condition in the performance of duty. The Office accepted that appellant was exposed to asbestos material while employed with the employing establishment. However, the Office found that there was no evidence that appellant's exposure resulted in any asbestos-related disease. The Office found that the weight of the medical evidence was represented by Dr. Mette, the second opinion examiner, whose thorough examination and testing revealed no evidence of any asbestos-related illness or disease.

By letter postmarked June 6, 2006, appellant requested an oral hearing.

By decision dated July 21, 2006, the Office denied appellant's request for an oral hearing. The Office stated that appellant's request was postmarked June 6, 2006, which was more than 30 days after the issuance of the Office's May 2, 2006 decision and that he was, therefore, not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing that 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 the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[2] 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.[3]

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; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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.[4]

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his claimed asbestos-related condition and his federal employment. This burden includes providing medical evidence from a physician who concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[5]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] *Id.*

[5] *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision as a conflict exists in the medical opinion evidence as to whether appellant's claimed asbestos-related condition is causally related to factors of his employment.

In support of his claim, appellant submitted reports from Drs. Wilkenfeld and Belli. Dr. Wilkenfeld reviewed the test results and other information from appellant's 1997 medical screening. He noted a history of shortness of breath when rushing on level ground or walking up a slight hill, present since the 1970's. Appellant also related having coughed productive of yellow sputum and blood streaked sputum, in addition to coughing up blood. Dr. Wilkenfeld stated that appellant had pleuritic chest pain, difficulty swallowing and abdominal pain, recent changes in bowel habits and blood in his stools. Given appellant's 20-year exposure to large amounts of asbestos while working as a pipefitter and air conditioning mechanic, Dr. Wilkenfeld believed that the pleural plaques detected on chest x-ray occurred as a direct result of this asbestos exposure. Dr. Belli opined that, based an appellant's history of significant asbestos exposure, abnormal chest radiograph and physical examination findings, a diagnosis of asbestos-related pleural disease was established within a reasonable degree of medical certainty. He stated that spirometry findings revealed evidence of neither obstructive nor restrictive process and noted the absence of respiratory failure on the lateral x-ray. Dr. Belli also noted that appellant's lungs appeared free of active disease, with no radiographic evidence of interstitial fibrosis and no lung masses seen. He did opine, however, that there was pleural thickening present in both hemothoraces and that the findings were consistent with asbestos-related pleural disease. Dr. Belli concluded that, due to appellant's abnormal physical findings, borderline spirometry and history of shortness of breath this individual should undergo complete pulmonary function studies in the future.

The Office found that the evidence appellant submitted regarding whether he had an asbestos-related condition was equivocal and referred him to Dr. Mette for a second opinion examination. Dr. Mette stated on April 19, 2006 that there was no evidence of asbestos-related lung disease. He relied on a physical examination, history of alleged exposure, evaluation of chest x-ray and pulmonary function tests. While Dr. Mette acknowledged that appellant had a 20-year exposure to asbestos, he asserted that pulmonary function testing and radiographic testing performed in his laboratory did not support a diagnosis of asbestosis or restrictive impairment. He concluded that there were no findings to suggest asbestosis or pleural abnormalities.

Section 8123(a) of the Act[6] provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.

The Board finds that a conflict in medical opinion exists between appellant's treating physicians Drs. Wilkenfeld and Belli and the Office's second opinion physician, Dr. Mette, as to whether appellant has an asbestos condition causally related to factors of his federal employment. To resolve this conflict, the Office shall refer appellant, together with the medical record and a statement of accepted facts, to an appropriate impartial medical specialist for a well-

[6] 5 U.S.C. § 8123(a).

reasoned opinion as to whether appellant does have an employment-related asbestos condition. After such further development as necessary, the Office shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of and Office's final decision.[7] A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[8] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[9] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[10]

ANALYSIS -- ISSUE 2

In the present case, because appellant's June 6, 2006 request for a hearing was postmarked more than 30 days after the Office's May 2, 2006 decision denying compensation for a claimed asbestosis-related condition, he is not entitled to a hearing as a matter of right. The Office considered whether to grant a discretionary hearing and correctly advised appellant that he could pursue his claim through the reconsideration process. As appellant may address the issue in this case by submitting to the Office new and relevant evidence with a request for reconsideration, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing. The Board, therefore, affirms the Office's July 21, 2006 decision denying appellant an oral hearing by an Office hearing representative.

CONCLUSION

The Board finds that this case is not in posture for decision as to whether appellant has an asbestosis-related condition sustained in the performance of duty. This case is remanded to the Office for further development to be followed by an appropriate decision. The Board also finds that the Office properly denied appellant's request for an oral hearing before an Office hearing representative.

[7] 5 U.S.C. § 8124(b)(1).

[8] 20 C.F.R. § 10.131(a)(b).

[9] *William E. Seare*, 47 ECAB 663 (1996).

[10] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2006 decision be set aside and the July 21, 2006 decision of the Office of Workers' Compensation Programs' be affirmed.

Issued: January 23, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board