# United States Department of Labor
# Employees' Compensation Appeals Board

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| **A.H., Appellant** | ) | |
| **and** | ) | **Docket No. 07-591** |
| | ) | **Issued: May 31, 2007** |
| **TENNESSEE VALLEY AUTHORITY, BULL RUN FOSSIL PLANT, Clinton, TN, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On December 27, 2006 appellant filed a timely appeal from the February 27, May 25 and September 25, 2006 merit decisions of the Office of Workers' Compensation Programs, which denied his claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of his claim.

### ***ISSUE***

The issue is whether appellant sustained a pulmonary condition in the performance of duty.

## ***FACTUAL HISTORY***

On April 12, 2002 appellant, then 63-year-old retired maintenance worker, filed an occupational disease claim alleging that his asbestosis was a result of his federal employment: "I worked in maintenance in and around asbestos and I started coughing extremely bad."[1]

Dr. Antoin H. Mardini, a Board-certified internist, examined appellant on December 11, 2001 and March 20, 2002. He stated that appellant was suffering from asbestosis, most likely from handling asbestosis while working for the employing establishment from 1973 to 1989. Dr. Mardini reported that chest x-rays obtained on October 29, 2001 showed parenchymal abnormalities, small opacities in the bilateral lower fields and some pleural abnormalities. He diagnosed parenchymal abnormalities consistent with asbestosis, bilateral lung fields.

On October 19, 2002 Dr. Ronald R. Cherry, a Board-certified internist specializing in pulmonary disease, reported as follows:

> "[Appellant] has had significant occupational exposure to asbestos dust in the past which has, to a reasonable degree of medical certainty, resulted in asbestosis which is the parenchymal lung scarring caused by the retention of asbestos fibers in the lungs.
>
> "[Appellant] has developed dyspnea with exertion and is known to have a moderate restrictive impairment of lung function and reduction in his diffusion capacity, also consistent with his asbestosis. I have advised [him] regarding his increased risk of [m]esothelioma related to asbestos exposure, and also his increased risk of lung cancer related to both asbestosis and cigarette smoking."

On May 5, 2004 Dr. Cherry reported that x-rays dated April 21, 2004 revealed bilateral interstitial infiltrates, primarily in the mid to lower lung zones, consistent with asbestosis. He diagnosed asbestosis, which appeared to have progressed some in comparison to the previous year.

On January 12, 2005 Dr. Cherry again addressed appellant's occupational exposure to asbestos:

> "[Appellant] is a patient of mine who suffers from asbestosis. [He] had significant occupational exposure to asbestos dust while working at various TVA [Tennessee Valley Authority] plants from 1973 through 1989. [Appellant] also had asbestos dust exposure when working on brake pads for 8 [to] 10 years off and on, starting at the age of 18. I believe the asbestosis in [him] is related to all of these asbestos exposures. It should be noted that there is on average a 20-year delay between the onset of asbestos exposure and the development of asbestosis. [Appellant's] asbestos-related lung disease certainly falls within this general latency period."

[1] On the prior appeal of this case, the Board found that appellant's claim was timely. Docket No. 05-1179 (issued August 16, 2005).

The Office accepted that appellant was exposed to asbestos in the course of his federal employment for various periods from 1973 to 1989. The Office referred appellant, together with a statement of accepted facts, to Dr. Suresh Enjeti, a Board-certified internist specializing in pulmonary disease, for a second opinion on causal relationship.

On December 18, 2005 Dr. Enjeti diagnosed moderate obstructive airways disease. He noted subtle abnormalities in the chest x-ray that needed better evaluation with a high-resolution computerized tomography (CT) scan of the chest without contrast to look for abnormalities consistent with pulmonary parenchymal and pleural changes associated with asbestos. Dr. Enjeti stated that the primary abnormality, obstructive airways disease, was related to smoking.

On February 15, 2006 Dr. Enjeti reported that a January 16, 2006 high-resolution CT scan of the chest showed no evidence of parenchymal or pleural abnormalities associated with asbestos exposure.

On March 13, 2006 Dr. Cherry reported that conventional posterior-anterior chest x-rays were superior to chest CT scans in the evaluation and staging of asbestos, in his opinion. He noted that the International Labor Organization used chest x-rays rather than chest CT scans in this regard. Dr. Cherry continued to diagnose asbestosis. On June 23, 2006 Dr. R. Hal Hughes, specializing in pulmonary critical care medicine, diagnosed mild increased interstitial and nodular markings in a patient with known asbestos exposure "who is essentially a nonsmoker." He stated: "I think this is highly suspicious for asbestosis."

The Office denied appellant's claim for compensation in decisions dated February 27, May 25 and September 25, 2006. On December 14, 2005 the Office denied appellant's November 21, 2006 request for reconsideration.

## ***LEGAL PRECEDENT***

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of proof to establish the essential elements of his claim. When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.[3]

Causal relationship is a medical issue,[4] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete

[2] 5 U.S.C. §§ 8101-8193.

[3] *See Walter D. Morehead*, 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury). *See generally John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *Mary J. Briggs*, 37 ECAB 578 (1986).

factual and medical background of the claimant,[5] must be one of reasonable medical certainty,[6] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[7]

Section 8123(a) of the Act provides in part: "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."[8]

## ***ANALYSIS***

The Office accepted that appellant was exposed to asbestos in the course of his federal employment for various periods from 1973 to 1989. Appellant has therefore established that he experienced a specific exposure occurring at the time, place and in the manner alleged. The question that remains is whether this exposure caused an injury.

Appellant submitted medical opinions supporting that the accepted exposure caused asbestosis. Dr. Mardini was of the opinion that appellant was suffering from asbestosis, most likely from handling asbestosis while working for the employing establishment from 1973 to 1989. Dr. Cherry stated that appellant's occupational exposure to asbestos dust had, to a reasonable degree of medical certainty, resulted in asbestosis. Both reported x-ray findings consistent with asbestosis. Dr. Hughes added that his x-ray findings were "highly suspicious" for asbestosis.

Dr. Enjeti, the Office referral physician, disagreed. He diagnosed moderate obstructive airways disease causally related to smoking. Although Dr. Enjeti noted subtle abnormalities in the chest x-ray, a high-resolution CT scan of the chest showed no evidence of parenchymal or pleural abnormalities associated with asbestos exposure.

The Board finds a conflict in medical opinion between appellant's physicians and the Office referral physician on whether appellant's accepted exposure to asbestos in federal employment caused an injury. The Board will therefore set aside the Office decisions denying appellant's claim and remand the case for further development pursuant to section 8123(a) of the Act. The Office shall refer appellant to an appropriate impartial medical specialist for examination and a reasoned opinion on whether appellant's accepted exposure to asbestos caused a respiratory injury. Following such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on appellant's claim for compensation.

[5] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[6] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[7] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[8] 5 U.S.C. § 8123(a).

## ***CONCLUSION***

The Board finds that this case is not in posture for decision. A conflict in medical opinion necessitates further development of the evidence.[9]

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 25, May 25 and February 27, 2006 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action consistent with this opinion.

Issued: May 31, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

[9] The disposition of this appeal renders moot the Office's December 14, 2005 nonmerit decision denying reconsideration.