



## **FACTUAL HISTORY**

On June 23, 2006 appellant, then a 61-year-old maintenance worker, filed an occupational disease claim alleging exposure to filthy, dusty, polluted air from the debris of Hurricane Katrina at dumpsites in Mississippi. He developed a serious chest cough and ache.

In a July 10, 2006 memorandum, appellant's supervisor described his duties. Appellant received incoming truckloads of debris generated by Hurricane Katrina, estimated the debris load size, directed truck traffic to the proper dump location on site and ensured truck compliance with safety regulations. The supervisor noted that appellant's work did not require him to work on the debris piles or come in direct physical contact with any materials. However, appellant was subject to any dusty conditions that arose. The supervisor also noted that field testing of appellant's worksite for hazardous materials and airborne contaminants was conducted with the results documented and available. Hazardous airborne particulates such as asbestos were not found in any of the tests conducted at the site. Appellant was working temporary duty at the dumpsite from September 13 to December 12, 2005 and January 11 to March 13, 2006.

On July 6, 2006 the Office requested additional factual and medical information from appellant, including a comprehensive medical report from a physician. No medical evidence was received.

In an August 24, 2006 decision, the Office denied appellant's claim finding that the evidence was not sufficient to establish that he sustained an occupational disease. It found that the claimed exposure occurred as alleged but there was no medical evidence which provided any diagnosis.

On October 2, 2006 appellant requested reconsideration. A June 15, 2006 chest x-ray report from Dr. Robert E. Morris, a radiologist, compared the films to those dated May 6, 2005. Dr. Morris found that subtle stranding was noted in the left lung base which was not evident previously. He also found that the appearance "suggests some atelectasis and/or a possible slight infiltrate from pneumonia." In a July 17, 2006 report, Dr. Morris compared current films with those of May 6, 2005 and June 14, 2006 and found that the slight stranding in the left lung base had resolved and that the lungs were currently clear. A pulmonary function analysis was performed on June 15, 2006 by James Hansen, a physician's assistant, who noted a possible early obstructive pulmonary impairment and recommended repeat testing.

In an August 15, 2006 summary report, Dr. Kate Flanigan Sawyer, Board-certified in occupational medicine, stated that appellant described pulmonary and dermatologic symptoms, including cough, headaches, shortness of breath and skin rash. She recommended appellant seek care from a pulmonologist.

In an August 21, 2006 report, Dr. Bayu Teklu, Board-certified in family medicine, reported that appellant had been experiencing a cough for quite sometime, which became worse after he returned from Mississippi. Appellant also complained of palpitations and chest pain. Dr. Teklu reported that the chest x-ray reports were normal and listed the impression of allergic or hyperactive airway disease. An August 25, 2006 computerized tomography scan of the chest revealed hyperinflation with lower lung zone septal thickening, but otherwise no acute finding.

In a January 10, 2007 decision, the Office denied modification of the August 24, 2006 decision finding that the medical evidence submitted was insufficient to establish that appellant sustained a pulmonary condition causally related to the accepted employment exposure.

On October 10, 2007 appellant requested reconsideration. No additional information was received.

In an October 31, 2007 nonmerit decision, the Office denied reconsideration finding that appellant's request did not warrant further merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of the Act and 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 or specific condition for which compensation is claimed is causally related to the employment injury.<sup>1</sup>

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 the factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the 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 factors identified by the claimant.<sup>2</sup>

Causal relationship is a medical issue,<sup>3</sup> which is established though medical evidence which must include a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant,<sup>4</sup> must be one of reasonable medical certainty<sup>5</sup> and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established factors of employment.<sup>6</sup>

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<sup>1</sup> *Anthony P. Silva*, 55 ECAB 179 (2003).

<sup>2</sup> *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005).

<sup>3</sup> *Mary J. Briggs*, 37 ECAB 578 (1986).

<sup>4</sup> *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

<sup>5</sup> *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

<sup>6</sup> *See William E. Enright*, 31 ECAB 426, 430 (1980).

## ANALYSIS -- ISSUE 1

Appellant alleges that he sustained a pulmonary condition as a result of his employment-related exposure while working at a dumpsite cleaning up debris from Hurricane Katrina. The Office accepted his occupational exposure while at the dumpsite. The issue is whether the medical evidence is sufficient to establish that appellant sustained a diagnosed condition causally related to this exposure.

The medical evidence is insufficient to establish that appellant sustained a pulmonary diagnosed condition causally related to his federal employment. The medical evidence indicates that he had hyperactive airway disease, as diagnosed by Dr. Teklu. However, Dr. Teklu did not offer any opinion as to the cause of appellant's condition. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>7</sup> To establish causal relationship, appellant must submit a physician's report in which the physician reviews the employment factors identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination, state whether the employment injury caused or aggravated the diagnosed conditions and present medical rationale in support of his or her opinion.<sup>8</sup> Dr. Teklu failed to provide an opinion as to the cause of appellant's airway disease or an explanation as to how the condition was causally related to accepted employment exposure.

The remainder of the medical evidence does not provide a firm medical diagnosis. Dr. Morris found that appellant had "some atelectasis and/or a possible slight infiltrate from pneumonia." However, this report is speculative and not a definitive diagnosis. The Board has held that medical opinions that are speculative or equivocal in character are of diminished probative value.<sup>9</sup> A physician's assistant noted that appellant had a "possible early obstructive pulmonary impairment" however his report does not constitute medical evidence.<sup>10</sup> Dr. Sawyer reported that appellant described pulmonary and dermatologic symptoms such as cough, headaches, shortness of breath and skin rash, related to his employment. However, she did not provide confirmation of any diagnosis or an opinion as to the cause of his complaints. As noted medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>11</sup>

Appellant has not established that he sustained a diagnosed condition therefore it follows that he has not established that any such condition is causally related to his accepted employment events. The burden is on him to establish through medical evidence that he sustained a condition

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<sup>7</sup> *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>8</sup> *D.D.*, 57 ECAB 734 (2006); *Calvin E. King*, 51 ECAB 394 (2000).

<sup>9</sup> *Kathy A. Kelley*, 55 ECAB 206 (2004).

<sup>10</sup> A physician's assistant is not a physician as defined under the Act. See *Roy L. Humphrey*, 57 ECAB 238 (2005).

<sup>11</sup> *Michael E. Smith*, *supra* note 7.

as a result of his employment. The Board finds that appellant has not met his burden to establish his occupational disease claim.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.<sup>12</sup> Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>13</sup> When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Office is required to reopen a case for merit review if appellant demonstrates that it erroneously applied a specific point of law, puts forth relevant and pertinent new evidence or presents a new relevant legal argument. Appellant did not present any argument that the Office erroneously applied a point of law or present a new relevant legal argument. He did not submit any evidence after the Office issued its January 10, 2007 merit decision. Therefore, appellant did not submit relevant and pertinent new evidence. The Board finds that he is not entitled to further review of the merits of his claim under section 10.606(b)(2). The Office properly refused to reopen his case for further review of the merits.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration. The Board also finds that appellant had not established that he sustained an occupational disease in the performance of duty.

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<sup>12</sup> 20 C.F.R. § 10.606(b)(2) (2003).

<sup>13</sup> *Id.* at § 10.608(b) (2003).

<sup>14</sup> *Annette Louise*, 54 ECAB 783 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decisions dated October 31 and January 10, 2007 are affirmed.

Issued: October 22, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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