United States Department of Labor
Employees' Compensation Appeals Board

E.W., Appellant	)	
and	)	**Docket No. 08-2199**
	)	**Issued: April 13, 2009**
DEPARTMENT OF THE ARMY, U.S. ARMY MATERIAL COMMAND, Fort Monmouth, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 6, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated October 30, 2007 and May 6, 2008, denying his occupational injury claim and the July 3, 2008 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an injury causally related to factors of his federal employment; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 16, 2006 appellant, then a 76-year-old retired electronics mechanic, filed an occupational disease claim alleging that he developed restrictive lung disease, chronic obstructive pulmonary disease (COPD), sleep apnea and aggravation of a heart condition, due to testing lithium batteries and exposure to asbestos during his federal employment, from the late 1980's until his retirement on January 31, 1995. He stated that he became aware of his illness on March 28, 2005 and realized that it was caused or aggravated by his employment on September 29, 2006.

In a letter dated July 16, 2006, the Office informed appellant that the evidence submitted was insufficient to establish his claim. It requested an explanation as to why he believed that the testing of lithium batteries caused any medical condition; details pertaining to the alleged asbestos exposure; and a medical report with diagnoses and an opinion explaining how appellant's claimed exposure caused or aggravated his diagnosed conditions.

The record contains an internal memorandum dated July 16, 2007 entitled "Material Safety Data Sheet in Lithium Batteries." The memorandum indicates that the lithium batteries tested at the employing establishment are hermetically sealed and nonreactive, provided the integrity of the battery is maintained.

Appellant submitted an April 26, 2005 report from Dr. Gerald Ukrainski, a Board-certified internist, who diagnosed coronary artery disease. Dr. Ukrainski's examination of appellant revealed normocephalic carotid pulses brisk in upstroke and symmetrical, no jugular venous distension, no thyromegaly, no cervical lymphadenopathy and no masses. Carotid artery auscultation revealed bilateral carotid bruit. Cardiac examination reflected regular rhythm, with no murmur, click or rub. Lung auscultation revealed rales at the right base. Dr. Ukrainski assessed status post stent to proximal LAD after presenting with unstable angina; hypertension; hyperlipidemia; and fatigue and weakness, probably secondary to bradycardia. On July 14, 2007 he reported a total occlusion of both superficial femoral arteries, as demonstrated by a February 26, 2006 peripheral angiogram. Dr. Ukrainski also noted severe calcification in the infrarenal abdominal aorta. He stated that appellant had been diagnosed with sleep apnea and interstitial lung disease.

In a report of an April 19, 2006 computerized tomography (CT) scan of the chest, Dr. Bruce Biederman, a Board-certified radiologist, diagnosed peripheral bibasilar interstitial lung disease and stated that some of the changes could be related to chronic disease. He also reported some mild bronchiectasis in the left upper lung and calcified pleural plaques in the right lung. Dr. Biederman noted bullous changes in both lung apices.

In a report of an August 31, 2005 sleep study, Dr. Salaan T. Alobeidy, a treating physician, diagnosed severe obstructive sleep apnea syndrome. The record contains diagnostic reports including reports of chest x-rays dated March 29, 2004 and March 28 and April 11, 2005, a report of a March 28, 2005 CT scan and correlative study, an April 12, 2005 cardiographic report, a report of an April 18, 2006 CT scan of the neck and head, results of laboratory tests dated March 6 and 21 and April 21, 2006; and a March 30, 2006 segmental pressure and PVR

study of the lower extremities. The record also contains largely illegible notes, bearing illegible signatures, for the period April 21, 2005 through June 29, 2006.

In a report dated September 29, 2006, Dr. Jack M. Kanoff, a Board-certified osteopath specializing in pulmonary diseases, provided a medical history, which included pneumonia, a myocardial infarction, coronary artery disease, cardiac catheterization, hypertension, hyperlipidemia and COPD. His review of an April 12, 2005 echocardiogram revealed mild pulmonary hypertension. An April 26, 2005 CT scan of the chest showed chronic fibronodular scarring, bronchiectasis and pleural plaques. A repeat scan performed on April 18, 2006 revealed peripheral basilar interstitial lung disease, most advanced at the posterior right lung base, lateral base, right lobe and lateral segment of the right middle lobe. Dr. Kanoff noted changes in the anterolateral right middle lobe and posterior basilar left lower lobe. He noted results of a pulmonary function study, which revealed reduced lung capacity. Dr. Kanoff diagnosed: interstitial lung disease; COPD; obstructive sleep apnea; coronary artery disease; myocardial infarction; and hyperlipidemia. He noted that appellant had worked as an electrician's technician, where he had experienced minimal asbestos exposure and significant exposure to lithium batteries. Dr. Kanoff stated that, given appellant's exposure to asbestos and lithium, it was within a reasonable degree of medical certainty "that these occupational exposures may have been associated with his interstitial lung disease." He further indicated that appellant had a component of obstructive airways disease "most likely secondary to toxic effects of tobacco."

Appellant provided an employment history, which reflected that, from 1981 through 1995, he tested lithium batteries on a daily basis for durability and endurance. He alleged that he was often exposed to contaminated air, due to the fact that the batteries he tested were often "vented." Appellant stated that asbestos covered the pipes in the building in which he worked.

In a narrative statement dated August 1, 2007, appellant reiterated his belief that his exposure to asbestos and lithium batteries caused his heart, lung and sleep conditions. He stated that as he tested the batteries, which involved draining the voltage from them, they often emitted strong odors, requiring the use of exhaust fans and the use of gas masks. Appellant stated that, though he had been short of breath for many years, he was not fully aware of the relationship between his condition and his work exposure until March 28, 2005. He also stated that he had smoked a pack of cigarettes per day from 1960 until April 1, 2003, when he stopped smoking.

By decision dated October 30, 2007, the Office accepted that appellant tested and drained voltage from lithium batteries during his employment and that the facility in which he worked had asbestos pipes. However, it denied his claim on the grounds that he had not established a causal relationship between a diagnosed condition and the work-related exposure.

Appellant requested an oral hearing, which was held on February 20, 2008. He testified that the battery testing facility had to be shut down for a couple of hours at a time when batteries "vented," filling the air with the smell of rotten eggs. Appellant alleged that such action was required approximately three to four times per week from 1981 through 1995, when he retired. He stated that the pipes in his facility were covered with asbestos and that men in "outer space uniforms" came in to remove it. Appellant clarified that he was not present when the asbestos was removed.

By decision dated May 6, 2008, the Office hearing representative affirmed the Office's October 30, 2007 decision, finding that appellant had failed to provide a rationalized medical opinion establishing that his diagnosed conditions were causally related to accepted lithium exposure. The representative found that, the evidence did not establish that he had been exposed to asbestos fibers, as he was not present during the removal of the asbestos and he was not diagnosed with asbestosis.

On May 15, 2008 appellant requested reconsideration. In support of his request, he submitted a letter dated May 5, 2008 from Dr. Kanoff. The letter was an exact duplicate of his original May 5, 2008 report, but for an addendum, which provided as follows: "[Appellant's] exposure to asbestos and lithium batteries caused or aggravated his interstitial lung disease to a reasonable degree of medical certainty."

In a July 3, 2008 decision, the Office denied appellant's request for consideration on the grounds that the evidence submitted was insufficient to warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his claim, including the fact that an injury was sustained in the performance of duty as alleged[2] and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury.[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 the 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 diagnosed condition is causally related to the employment factors identified by the claimant.[4] The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence, *i.e*., medical evidence presenting a physician's well-reasoned opinion on how the established factor of employment caused or contributed to claimant's diagnosed condition. To be of probative value, 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

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joseph W. Kripp*, 55 ECAB 121 (2003); *see also Leon Thomas*, 52 ECAB 202, 203 (2001). "When an employee claims that he sustained 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 manner alleged. He must also establish that such event, incident or exposure caused an injury." *See also* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R § 10.5(q) and (ee) (2002) ("Occupational disease or Illness" and "Traumatic injury" defined).

[3] *Dennis M. Mascarenas*, 49 ECAB 215, 217 (1997).

[4] *Michael R. Shaffer*, 55 ECAB 386 (2004). *See also Solomon Polen*, 51 ECAB 341, 343 (2000).

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.[5]

An award of compensation may not be based on appellant's belief of causal relationship. Neither, the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.[6]

ANALYSIS -- ISSUE 1

The Office accepted that appellant was exposed to lithium while testing lithium batteries during his federal employment and that the facility in which he worked had asbestos pipes.[7] However, it denied his claim on the grounds that he had not established a causal relationship between a diagnosed condition and work-related exposure. The Board finds that the medical evidence of record is insufficient to establish that appellant's diagnosed cardiac, lung and sleep conditions were caused or aggravated by exposure to these substances. Therefore, appellant has failed to meet his burden of proof.

Relevant medical evidence of record includes a September 29, 2006 report from Dr. Kanoff, who provided a medical history, which included pneumonia, a myocardial infarction, coronary artery disease, cardiac catheterization, hypertension, hyperlipidemia and COPD. His review of an April 12, 2005 echocardiogram revealed mild pulmonary hypertension. An April 26, 2005 CT scan of the chest showed chronic fibronodular scarring, bronchiectasis and pleural plaques. A repeat scan performed on April 18, 2006 revealed peripheral basilar interstitial lung disease. Dr. Kanoff noted changes in the anterolateral right middle lobe and posterior basilar left lower lobe, which could be related to chronic disease. Results of a pulmonary function study revealed reduced lung capacity. Dr. Kanoff diagnosed: interstitial lung disease; COPD; obstructive sleep apnea; coronary artery disease; myocardial infarction; and hyperlipidemia. He noted that appellant had worked as an electrician's technician, where he had experienced minimal asbestos exposure and significant exposure to lithium batteries. Dr. Kanoff stated that, given appellant's exposure to asbestos and lithium, it was within a reasonable degree of medical certainty "that these occupational exposures may have been associated with his interstitial lung disease." His opinion is vague and speculative and is not based on a complete factual background describing the degree of appellant's exposure to lithium and asbestos. Dr. Kanoff did not state with specificity which substance he believed to have caused the diagnosed lung disease, lithium or asbestos, nor did he explain the nature of the relationship between appellant's diagnosed condition and his occupational exposure.[8] Dr. Kanoff indicated that appellant had a component of obstructive airways disease "most likely secondary to toxic effects of tobacco." However, he did not explain why he attributed appellant's interstitial lung

[5] *Leslie C. Moore*, 52 ECAB 132, 134 (2000); *see also Ern Reynolds*, 45 ECAB 690, 695 (1994).

[6] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Dennis M. Mascarenas*, *supra* note 3 at 218.

[7] The Board notes that the Office found that, the evidence did not establish that appellant had been exposed to asbestos fibers, as he was not present during the removal of the asbestos and he was not diagnosed with asbestosis.

[8] *Leslie C. Moore*, *supra* note 5.

disease to occupational exposure, rather than to the effects of tobacco. Medical conclusions unsupported by rationale are of limited probative value.[9] For all of these reasons, Dr. Kanoff's report is insufficient to establish appellant's claim.

On April 26, 2005 Dr. Ukrainski diagnosed coronary artery disease. His report did not provide a history of exposure to lithium or asbestos or an opinion as to the cause of the diagnosed condition. The Board has long held that medical evidence that does not offer any opinion on the cause of a claimant's condition is of limited probative value.[10] The remaining medical evidence, including reports of CT scans, sleep studies, x-rays, electrocardiogram's, PVR studies and illegible physician's notes, which do not contain an opinion on the cause of appellant's claimed conditions, do not constitute probative medical evidence.

Appellant expressed his strong belief that his diagnosed lung, cardiac and sleep conditions resulted from his exposure to asbestos and lithium. However, the Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[11] Neither the fact that the condition became apparent during a period of employment nor the belief that the condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.[12] Causal relationship must be substantiated by reasoned medical opinion evidence, which it is appellant's responsibility to submit. Although the Office accepted that appellant was exposed to lithium and worked in an area which contained asbestos-covered pipes, during the course of his employment, he did not submit a rationalized medical opinion explaining how such exposure caused his diagnosed conditions. Appellant's belief that his conditions were caused by the accepted exposure is not determinative.

The Office advised appellant that it was his responsibility to provide a comprehensive medical report, which described his symptoms, test results, diagnosis, treatment and the physician's opinion, with medical reasons, on the cause of his condition. Appellant failed to do so. As there is no probative, rationalized medical evidence addressing how his claimed conditions were caused or aggravated by his accepted exposure, he has not met his burden of proof in establishing that he sustained an occupational disease in the performance of duty causally related to factors of employment.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[13] the Office regulations provide that the evidence or argument submitted by a claimant

[9] *Willa M. Frazier*, 55 ECAB 379 (2004).

[10] *See Jaja K. Asaramo*, 55 ECAB 200 (2004).

[11] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[12] *Id.*

[13] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[14] To be entitled to a merit review of an Office decision, denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[15] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[16] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[17]

ANALYSIS -- ISSUE 2

Appellant's May 15, 2008 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of his request for reconsideration, appellant submitted a letter dated May 5, 2008 from Dr. Kanoff. The letter was an exact duplicate of his original May 5, 2008 report, but for an addendum, which provided as follows: "[Appellant's] exposure to asbestos and lithium batteries caused or aggravated his interstitial lung disease to a reasonable degree of medical certainty." Although his letter contains new terminology, Dr. Kanoff did not address the relevant issue, namely how the accepted employment exposure caused appellant's diagnosed conditions. Although appellant stated an opinion regarding causal relationship, he did not provide a rationalized explanation for his opinion. His report merely reiterates information contained in documents previously received and reviewed by the Office and is, therefore, cumulative and duplicative in nature.[18] The Board finds that appellant's report does not constitute relevant and pertinent new evidence not previously considered by the Office.[19] Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his May 15, 2008 request for reconsideration.

[14] 20 C.F.R. § 10.606(b)(2).

[15] *Id*. at § 10.607(a).

[16] *Id*. at § 10.608(b).

[17] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[18] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

[19] *See Susan A. Filkins*, 57 ECAB 630 (2006).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation dated July 3 and May 6, 2008 and October 30, 2007 are affirmed.

Issued: April 13, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board