United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 13-18**
	)	**Issued: May 14, 2013**
TENNESSE VALLEY AUTHORITY, Chattanooga, TN, Employer	)	

Appearances:
Ronald K. Bruce, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 3, 2012 appellant, through his attorney, filed a timely appeal of an August 6, 2012 Office of Workers' Compensation Programs' (OWCP) merit decision denying his claim for a pulmonary injury. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he developed lung disease as a result of chemical exposures in the performance of duty.

On appeal counsel argued that there was a conflict in medical opinion regarding whether appellant had employment-related lung disease.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 17, 2011 appellant, then a 59-year-old supervisor of maintenance, filed an occupational disease claim alleging pneumoconiosis and bronchitis due to exposures during his federal employment. He began working at the employing establishment in 1976 and was exposed to asbestos-coated pipes. Appellant began work as an annual employee in 1986 and was exposed to coal dust on a daily basis in addition to asbestos on sheet metal. He held this second position for 10 years. In 1996 appellant worked as a pipefitter foreman and was exposed to coal dust, asbestos and flue gas as well as asbestos from pipe insulation. He noted that he occasionally wore a mask during this period. Appellant began working as a maintenance supervisor in 2008. In this position, he spent the majority of his time in an office, but was exposed to coal dust and flue gas approximately 30 percent of the time and did not wear a mask. Appellant noted that he worked as a pipefitter in the navy from 1971 to 1972. He stated that he worked for the Pipefitters Union Local from 1976 through 1986 while working in employing establishment power plants. Appellant smoked cigarettes for 10 to 11 years at the rate of one pack a day. He stopped smoking in 1980.

OWCP requested additional factual and medical evidence in a letter dated April 11, 2011. The employing establishment submitted an employment history that appellant began work in April 1976 and was intermittently assigned to various positions through January 2, 2009 when he retired.

In a report dated November 8, 2010, Dr. Glen Baker, a Board-certified internist and pulmonologist certified as a B reader, noted appellant's employment with the employing establishment for 33 years. He performed work as a pipefitter with exposure to coal dust, flue gas and asbestos. Dr. Baker noted appellant's smoking history. He found that appellant's chest x-ray of August 25, 2010 demonstrated occupational pneumoconiosis as well as irregular opacities consistent with a history of exposure to asbestos. Dr. Baker stated that appellant's pulmonary function studies were within normal limits. He diagnosed occupational pneumoconiosis with pulmonary asbestosis, mild bronchitis and obstructive sleep apnea. Dr. Baker stated, "His bronchitis and occupational pneumoconiosis are caused by his exposure to asbestos and other dusts, odors and fumes he was exposed to during his employment." He noted that appellant had no permanent impairment as his pulmonary function studies were within normal limits.

On April 12, 2011 the employing establishment submitted a job history noting that appellant had worked in various capacities for approximately 25 years. From 1976 through 2009, appellant had exposures to coal dust and asbestos below relevant permissible exposure limits. The employing establishment contended that, during appellant's employment for the prior 25 years, he was not exposed to coal dust and asbestos at or above the existing permissible exposure limits.

OWCP referred appellant for a second opinion evaluation. The statement of accepted facts noted his employment with the employing establishment from 1976 to 1986, his positions from 1986 through 2009 and his alleged exposures to asbestos, coal dust and flue gas. OWCP noted that appellant had a history of smoking one pack a day for 10 to 11 years.

In a report dated June 21, 2011, Dr. Peter Rosario, a Board-certified internist and pulmonologist, reviewed appellant's employment history and reviewed the diagnostic test. He stated, "I am hard pressed to give this gentleman a diagnosis of occupational lung disease or pneumoconiosis related to asbestos or coal dust exposure when objectively the physical examination, chest x-ray and pulmonary function studies, both now and in the past are essentially normal." Dr. Rosario suggested that appellant either had mild pneumoconiosis or another condition such as histoplasmosis. He stated that appellant's history of exposure to asbestos and coal dust was significant, but concluded that there was no asbestos or coal dust-induced lung disease, such as pneumoconiosis.

OWCP referred the medical evidence to OWCP's medical adviser on July 26, 2011. On July 29, 2012 the medical adviser found that appellant had no objective evidence of occupational lung disease. He also found that appellant had no permanent impairment of the lungs.

By decision dated August 8, 2011, OWCP denied appellant's occupational disease claim, finding that the medical evidence rested with Dr. Rosario's opinion of no asbestos or pneumoconiosis.

Appellant requested an oral hearing, before an OWCP hearing representative, on December 29, 2011.

Appellant testified at the April 12, 2012 oral hearing. He reported occasional shortness of breath and a constant cough. Counsel noted that Dr. Rosario was not a B-reader.

In a form report dated March 22, 2012, Dr. Matthew A. Vuskovich, a physician Board-certified in preventive medicine and a certified B-reader, reviewed appellant's August 25, 2010 x-ray. He found that appellant had abnormalities consistent with pneumoconiosis. Dr. Vuskovich stated that appellant had small opacities with a profusion of two.

By decision dated August 6, 2012, the hearing representative found that Dr. Baker's report was not based on an accurate history of injury as appellant did not have a 10-year employment exposure instead working for 2 years and 4 months.[2] She found that appellant did not establish that he developed lung disease as a result of exposures during his federal employment.

LEGAL PRECEDENT

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

[2] The Board notes that evidence from appellant and the employing establishment established that he worked for 25 years in various capacities.

diagnosed condition is causally related to the employment factors identified by the claimant. The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.[3]

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.[4] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[5]

ANALYSIS

The employing establishment submitted evidence that appellant worked from April 1976 through January 2, 2009 in various capacities. OWCP accepted that he was exposed to asbestos, coal dust and flue gas in the performance of his job duties. Appellant's attending physician, Dr. Baker, found that appellant's chest x-ray dated August 25, 2010 demonstrated occupational pneumoconiosis as well as irregular opacities consistent with a history of exposure to asbestos. OWCP referred appellant for a second opinion evaluation with Dr. Rosario who completed a report on June 21, 2011 and concluded that appellant's x-rays and physical examination established that there was no asbestos or coal dust-induced lung disease, pneumoconiosis. Appellant also submitted a form report dated March 22, 2012 from Dr. Vuskovich which found pleural abnormalities consistent with pneumoconiosis.

The Board finds that there is an unresolved conflict of medical opinion evidence regarding whether appellant's chest x-rays demonstrate pneumoconiosis. Appellant has submitted evidence from two physicians that his x-rays are consistent with this diagnosis. OWCP's second opinion physician disagreed and found that appellant's x-ray was not yet consistent with pneumoconiosis. Due to the disagreement between appellant's physicians and the physician for OWCP, the Board finds that the case must be referred to an impartial medical examiner to determine whether appellant has diagnostic evidence of pneumoconiosis.

CONCLUSION

The Board finds that this case is not in posture for decision as there is an unresolved conflict of medical opinion evidence.

[3] *Lourdes Harris*, 45 ECAB 545, 547 (1994).

[4] 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

[5] *R.C.*, 58 ECAB 238 (2006).

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: May 14, 2013
Washington, DC

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

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

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