United States Department of Labor
Employees' Compensation Appeals Board

R.A., Appellant	)	
and	)	**Docket No. 14-1918**
	)	**Issued: March 3, 2015**
TENNESSEE 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:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 3, 2014 appellant, through his attorney, filed a timely appeal from a July 25, 2014 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has a pulmonary condition caused or aggravated by factors of his federal employment.

On appeal appellant's attorney asserts that the medical evidence of record establishes that appellant has pneumoconiosis.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 31, 2013 appellant, then a 63-year-old former boilermaker, filed an occupational disease claim alleging that work duties in his federal employment caused occupational pneumoconiosis. He indicated that he first became aware of the disease and its relationship to his federal employment on November 20, 2012 upon learning his diagnosis. In an undated statement, appellant indicated that he worked for the employing establishment as a laborer from 1972 to 1973 and as a boilermaker for intermittent periods beginning on March 8, 1976 to July 25, 1991. He noted a 15- to 16-year history of smoking and claimed exposure to cement dust and asbestos at the employing establishment. Appellant indicated that from November 19, 1973 to January 6, 2006 he worked as a contract union employee in paper mills and power plants, including at the employing establishment plants and as a consultant at an employing establishment plant for three or four months beginning in 2006.

In support of his claim, appellant submitted a December 31, 2012 report in which Dr. Glen Baker, Board-certified in internal medicine and pulmonary disease and a certified B-reader, noted appellant's employment history, including approximately 12 years as a federal employee at the employing establishment where he was exposed to asbestos, coal dust, fly ash, flue gas, and arsenic fumes. Dr. Baker noted appellant's 15- to 16-year smoking history and described his complaints of dyspnea on exertion and symptoms suggestive of sleep apnea. Lungs were clear to auscultation and percussion on physical examination. Dr. Baker reported that a November 1, 2012 chest x-ray demonstrated evidence of occupational pneumoconiosis, category 1/0, consistent with pulmonary asbestosis, and that both pre and post-bronchodilator pulmonary function studies were normal. He diagnosed occupational pneumoconiosis, category 1/0, based on an abnormal x-ray and a significant history of asbestos exposure, and obstructive sleep apnea, based on symptoms. Dr. Baker concluded that appellant had no impairment under Table 5-4 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He attached copies of the x-ray interpretation which indicated a 1/0 profusion of small opacities and pleural abnormalities consistent with pneumoconiosis, and the pulmonary function studies, interpreted as normal.

In letters dated March 1, 2013, OWCP informed appellant of the evidence needed to support his claim and asked the employing establishment to reply to his allegations by submitting exposure data and his employment history.

In a February 11, 2013 statement, Mike Bradford, an industrial hygienist at the employing establishment, provided appellant's job history, which totaled 14.7 years, at three different employing establishment facilities. He described current and historical data for coal dust and asbestos exposure which he maintained was within the Office of Safety and Health Administration and the Environmental Protection Agency guidelines. A physical examination report for reemployment dated July 31, 1991 was attached. The signature on the report was illegible.

In June 2013 OWCP referred appellant, along with a statement of accepted facts, a set of questions, and the medical record, to Dr. Mohammed K. Shubair, Board-certified in internal medicine and pulmonary disease, for a second opinion evaluation. In a July 22, 2013 report, Dr. Shubair noted appellant's employment and smoking history and his reported symptoms of

mild shortness of breath. Lungs were clear to auscultation with no rales, rhonchi, or rubs on physical examination. Dr. Shubair noted the results of Dr. Baker's pulmonary function test and reported that appellant had a new test that day which was normal with no evidence of an obstructive or restrictive deficit. He opined that appellant's symptoms were more of deconditioning than lung disease. Dr. Shubair indicated that appellant was not disabled from a lung disease but noted that he had had an x-ray that showed some scarring. He stated that he had not seen the x-ray but "this could possibly be due to asbestos deposits." In an addendum dated September 11, 2013, Dr. Shubair indicated that he had reviewed appellant's pulmonary function test done on July 22, 2013.

In an addendum report of September 11, 2013, he further stated:

> "Of note is also that we have not done any chest x-ray as this has been done recently, and the x-ray that was done earlier at a different facility was reported by radiology to show some scarring which could be asbestos deposit as mentioned in my previous note, however, this did not cause any significant functional impairment in the lung function.... The evidence that he has been chronically exposed to the asbestos will be only an x-ray finding; however, that did not impair his function or his functional status, as well as his pulmonary function test."

By decision dated October 10, 2013, OWCP denied the claim. It found that appellant had been exposed to dust but that the medical evidence did not establish that a medical condition was causally related to the exposure. Appellant, through his attorney, timely requested a hearing, and submitted an April 21, 2014 x-ray report in which Dr. Matthew A. Vuskovich, Board-certified in occupational medicine and a B-reader, read the November 1, 2012 x-ray. Dr. Vuskovich indicated that appellant had 1/1 small opacities and no pleural abnormalities, and that the study was consistent with pneumoconiosis. At the hearing, held on May 12, 2014, appellant testified regarding his employment and exposure history. He stated that Dr. Shubair did not perform a chest x-ray and indicated that he had retired in July 2013. Appellant's attorney conceded that appellant had no pulmonary disability but asserted that, based on the x-ray reports, appellant had established that he had occupational pneumoconiosis.

In correspondence dated June 18, 2014, Mike Patty of the employing establishment provided comments regarding the hearing transcript and maintained that an x-ray diagnosis by a B-reader alone was not sufficient for a diagnosis of occupational pneumoconiosis. He attached a publication from the Centers for Disease Control and Prevention regarding chest radiography.

On July 25, 2014 an OWCP hearing representative affirmed the October 10, 2013 decision, finding that neither Dr. Baker nor Dr. Shubair provided sufficient rationale to explain that appellant had a lung disease causally related to his federal employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing 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 FECA, that the claim was timely filed within the applicable time limitation period of FECA, 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 is causally related to the employment injury. These are the essential elements of each and every compensation claim; regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[2]

OWCP regulations define the term "occupational disease or illness" as a condition produced by the work environment over a period longer than a single workday or shift."[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 diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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]

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[5] 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 employee.[6] 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 causal relationship.[7]

ANALYSIS

The Board finds this case is not in posture for decision regarding whether appellant has an employment-related pulmonary condition.

Dr. Baker, an attending pulmonologist and B-reader,[8] diagnosed occupational pneumoconiosis, based in part on a November 1, 2012 chest x-ray which the physician indicated showed had a 1/0 profusion of small opacities and pleural abnormalities consistent with

[2] *Roy L. Humphrey*, 57 ECAB 238 (2005).

[3] 20 C.F.R. § 10.5(ee).

[4] *Roy L. Humphrey, supra* note 2.

[5] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[6] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

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

[8] B-readers are physicians who have passed a proficiency test administered by the National Institute for Occupational Safety and Health (NIOSH). *See* 42 C.F.R. § 37.52.

pneumoconiosis. Pulmonary function studies were interpreted as normal. The November 1, 2012 chest x-ray was also read by Dr. Vuskovich, also a B-reader who advised that appellant had 1/1 small opacities and no pleural abnormalities, which he indicated was consistent with pneumoconiosis.[9]

Dr. Shubair, an OWCP referral pulmonologist, evaluated appellant on July 22, 2013. While he conducted pulmonary function studies, interpreted as normal, he also indicated that appellant had had an x-ray that showed some scarring. Dr. Shubair stated that he had not seen the x-ray but "this could possibly be due to asbestos deposits." In an addendum dated September 11, 2013, he stated that he had not done a chest x-ray but that one done in a different facility "was reported to show some scarring which could be asbestos…." He indicated that only an x-ray would show whether appellant had asbestos scarring.

It is well established that proceedings under FECA are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[10] Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues of the case.[11] In this case, OWCP accepted that appellant had been exposed to coal dust. Appellant's physicians Drs. Baker and Vuskovich advised that he had pneumoconiosis. Dr. Shubair, OWCP referral physician, indicated that whether appellant had asbestos or other x-ray findings could only be diagnosed by x-ray. However, he did not x-ray appellant. The question therefore remains as to whether appellant has an employment-related pulmonary condition. The case shall therefore be remanded to OWCP. On remand, OWCP shall seek clarification from Dr. Shubair, to include his interpretation of x-ray findings. The Board also notes that since Dr. Baker and Dr. Vuskovich are B-readers, OWCP should consider whether it would be helpful to authorize Dr. Shubair to consult a certified B-reader.[12] Following such further development as OWCP deems necessary, it shall issue a *de novo* decision on the merits of appellant's claim.

CONCLUSION

The Board finds that this case is not in posture for decision regarding whether appellant established an employment-related pulmonary condition.

[9] Pneumoconiosis is defined as the deposition of large amounts of dust or other particulate matter in the lungs and the subsequent tissue reaction. Types range from harmless to destructive conditions and are often named for the implicated substances including anthracosis, asbestosis, and silicosis. *Dorland's Illustrated Medical Dictionary*, 29th edition (2000).

[10] *See Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

[11] *Richard F. Williams*, 55 ECAB 343 (2004).

[12] *See S.T.*, Docket No. 08-1675 (issued May 4, 2009).

ORDER

IT IS HEREBY ORDERED THAT the July 25, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: March 3, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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