

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

J.S., widow of G.A, Appellant

and

**DEPARTMENT OF LABOR, OCCUPATIONAL
SAFETY & HEALTH ADMINISTRATION,
Denver, CO Employer**

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Docket No. 08-373

Issued: November 4, 2008

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 November 13, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 30, 2007 denying the employee's claim for compensation. Pursuant to 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 the employee sustained colon cancer or a respiratory condition causally related to his federal employment.

FACTUAL HISTORY

On January 27, 2005 the employee, a 45-year-old safety specialist, filed an occupational disease claim alleging that he sustained colon cancer causally related to his federal employment. In an accompanying statement, he reported that on March 2, 2001 he inspected a medical waste-treatment facility where he was exposed to chemical fumes and developed mouth lesions and had

gastrointestinal bleeding. The employee also stated that during the week of Thanksgiving 2001 he worked at the World Trade Center (WTC), where he was exposed to carcinogens and developed additional gastrointestinal bleeding.¹ In a June 25, 2005 statement, he alleged that he was exposed to high levels of asbestos while working at the WTC site. The employee began to experience rectal bleeding in the spring of 2001, but an August 15, 2001 colonoscopy was negative. He submitted an Environmental Protection Agency (EPA) documents regarding asbestos sampling data for the WTC.

With respect to the medical evidence, the employee provided a hospital discharge report dated January 21, 2005, which diagnosed colon cancer based on a computerized tomography scan. In an undated report received by the Office on March 15, 2005, Dr. Daniel Teitelbaum, a toxicologist, noted that the employee had performed inspections of facilities with toxic materials and had been at the WTC after September 11, 2001. He stated that it was recognized that colon cancer was increased in individuals with exposure to asbestos. Dr. Teitelbaum opined that it “seems reasonable to me that there is a significant likelihood that asbestos exposure at the WTC site had a promotional influence on what may have been a latent colon cancer.” By report dated May 25, 2005, Dr. Christopher Gonzalez stated that based on his review of medical records, the employee’s colon cancer was Stage 1 as of November 2001.

The Office prepared a statement of accepted facts and referred the employee for second opinion examinations. In a report dated September 12, 2005, Dr. Nuray Bilir, a gastroenterologist, provided a history and results on examination. He indicated that the employee had an early presentation of colon cancer and asbestos had been found to be associated with an increased risk of colon cancer. Dr. Bilir opined asbestos “might have contributed to his colon cancer formation.” In a report dated November 15, 2005, he stated that, while the medical literature did not show direct evidence of a cause and effect relationship, there was enough evidence to raise a suspicion of causal relationship and it could not be ruled out in the employee’s case. In a December 9, 2005 report, Dr. Bilir stated that it was “with reasonable medical probability that the claimant’s work-related asbestos exposure contributed to the claimant’s colon cancer.”

The employee was also seen for second opinion examination by Dr. Scott Phillips, a toxicologist. In a report dated October 10, 2005, Dr. Phillips provided a history and results on examination. Based on his review of medical records and scientific literature, there was no evidence to support causation of asbestos with the employee’s adenocarcinoma of the colon. Dr. Phillips stated that, although the epidemiologic studies suggested a slightly positive relationship between colon cancer and asbestos overall, there were other studies that did not support such an association. He concluded, “On the long latency associated with solid tumors it would be extraordinarily unlikely for this tumor to have appeared in such a short time period following exposure. Furthermore, in studying the scientific literature there is no evidence to support asbestos as a promot[e]r of adenocarcinoma of the colon or of a progresser for adenocarcinoma of the colon.”

¹ Appellant had filed a CA-2 form on June 25, 2002 alleging a respiratory condition causally related to the February 21, 2001 inspection and exposure at the WTC site from November 19 to 23, 2001. This OWCP File No. xxxxxx021, is a subsidiary file of the current case file on appeal.

The Office referred the employee for an additional second opinion examination by Dr. Jan Gray, an oncologist. With respect to a colonoscopy in August 2001, Dr. Gray noted that given the size of the current size of the tumor it would have been too small for detection in 2001. He stated that there was “no mainline cancer literature” to support causal relationship between asbestos and colon cancer. Dr Gray further opined “the exposure to various inhalants required by his job is not related to the onset of carcinoma of the colon. Unfortunately, he has eventually terminal metastatic carcinoma of the colon; however, it is unrelated to environmental exposures as best one can determine. I find no evidence to support that association.” In a February 16, 2006 report, he stated that he had reviewed additional medical evidence and his opinion remained unchanged.

By decision dated March 8, 2006, the Office denied the claim for compensation. It stated that the weight of the medical evidence was represented by Dr. Gray.

The employee requested a hearing before an Office hearing representative, which was held on November 6, 2006. Additional medical evidence was submitted. In a report dated October 12, 2006, Dr. Richard Martin, a pulmonologist, stated that lung function testing had shown a decrease in forced vital capacity (FVC) and forced expiratory volume in one second (FEV₁) after WTC exposure. He opined that the exposure had affected lung function. With respect to colon cancer, Dr. Martin opined that hazardous exposure had compromised the employee’s immune system, allowing cancer cells to rapidly expand.

In a report dated October 30, 2006, Dr. Andras Korenyi-Both, a pathologist, stated that the employee developed Al Eskan disease after exposure to toxic dust at the WTC site. He opined that the Al Eskan disease promoted his metastatic cancer. In a report dated November 2, 2006, Dr. Teitelbaum discussed both respiratory conditions and colon cancer. He stated that there was little doubt that workers employed in the clean up of the WTC site were exposed to a complex mixture that was likely to cause respiratory problems. Dr. Teitelbaum opined that the employee developed occupational asthma as a result of his employment exposure. With respect to colon cancer, he stated that cancer was a multi-stage disorder. Dr. Teitelbaum noted that most researchers believe that asbestos functions as a promoter rather than as a genotoxic material and if the employee had already developed some of the precursor steps toward a colon malignancy prior to his work at the WTC, exposure to the aerosol and the particles such as asbestos, chromium, cadmium and vanadium, would more probably than not have contributed to the promotion of his colon cancer.

By decision dated January 19, 2007, the Office hearing representative set aside the March 8, 2006 decision. The hearing representative found a conflict in medical opinion arose between second opinions physicians Dr. Gray and Dr. Phillips and the attending physicians, Drs. Teitelbaum, Korenyi-Both and Martin, regarding the causal relationship of colon cancer or a respiratory condition with the federal employment exposures.

The Office referred appellant, a statement of accepted facts and medical records, to Dr. Thomas Beller, a pulmonologist, and Dr. Michael Perry, an oncologist. In a report dated August 21, 2007, Dr. Beller stated that he had reviewed the medical file and the statement of accepted facts. He noted the employee’s exposure at the waste treatment plant and the WTC site, finding that asbestos exposure required a lengthy exposure of months or years before the

occurrence of respiratory disease. Dr. Beller also reported that, while asbestos exposure can cause respiratory problems, it does not cause asthma or obstructive pulmonary disease. He stated that the decrease in lung function was not clinically significant. Dr. Beller concluded that the employee did not have any diagnosed condition causally related to his federal employment exposures .

In a report dated August 28, 2007, Dr. Perry also reviewed the relevant evidence. He stated:

“Given the growth rate of colon cancers (about 90 [to] 100 days) and his 6 [centimeters] tumor at diagnosis it is unlikely that he had a visible tumor that was missed on the colonoscopy of 2001. While there is an interaction between mutagen exposure and genetic constitution at this time we cannot tell whether his exposures contributed in any way to the development of his colon cancer. He did have a positive family history in his grandfather with polyps found in his father. I am unaware of any textbook of oncology that considered asbestos, for example, as a carcinogen for the development of colorectal cancer.”

Dr. Perry was also asked to discuss whether employee had a compromised immune system. He opined that there was no objective evidence of a compromised immune system.

By decision dated August 30, 2007, the Office denied the claim for compensation. It found that the weight of the evidence was represented by Drs. Beller and Perry and did not establish colon cancer or a respiratory condition as employment related.

LEGAL PRECEDENT

A claimant seeking benefits under the Federal Employees’ Compensation Act² has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.³

To establish that an injury was sustained in the performance of duty, a claimant must submit: (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.⁴

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.115(e), (f) (2005); see *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

⁴ *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.⁵ A physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors must be based on a complete factual and medical background of the claimant.⁶ Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and the claimant's specific employment factors.⁷

ANALYSIS

The employee filed two claims for compensation in this case, based on specific incidents from 2001. He identified a February 21, 2001 inspection of a waste treatment plant as well as the period November 19 to 23, 2001 when he worked at the WTC site. The employee alleged that he was exposed to various chemicals during the inspection and to asbestos and other substances at the WTC site. A January 29, 2007 statement of accepted facts indicated that the employee was exposed to dioxin, mercury, HCL and toxic ash during the February 21, 2001 inspection. Regarding the WTC exposure, the Office accepted that the employee was exposed to asbestos levels from .006 to .230 and was exposed to building materials and various metals. The initial claim in 2002 was for a respiratory injury while the 2005 claim was for colon cancer.

An Office hearing representative found that there was a conflict in the medical evidence under 5 U.S.C. § 8123(a) on the issue of whether there was an injury causally related to the employment incidents.⁸ The employee submitted medical reports from Drs. Teitelbaum, Korenyi-Both and Martin regarding causal relationship. Dr. Teitelbaum found an occupational asthma, as well as the colon cancer, causally related to the employment exposure. Dr. Martin found an impaired lung function resulting from the employment exposure, and Dr. Korenyi-Both opined that the colon cancer developed after exposure to toxic dust at the WTC site. On the other hand, second opinion physician, Dr. Gray, opined that the colon cancer was not employment related. Second opinion physician Dr. Phillips also found no causal relationship between the colon cancer and the employment exposure.

On the issue of causal relationship between the diagnosed colon cancer and the identified employment factors, there was a conflict under 5 U.S.C. § 8123(a). The Board notes that although the Office hearing representative appeared to find a conflict with regard to a respiratory

⁵ See *Robert G. Morris*, 48 ECAB 238 (1996).

⁶ *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁷ *Id.*

⁸ 5 U.S.C. § 8123(a) provides that, if there is a 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 the examination. The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

condition, neither Dr. Gray nor Dr. Phillips had offered an opinion on this issue. There was no conflict. Therefore, the referral to pulmonologist, Dr. Beller, was as a second opinion physician.⁹

With respect to the colon cancer claiming the question is whether Dr. Perry, the referee physician, properly resolved the conflict. The Board finds that Dr. Perry did not provide an unequivocal, rationalized medical opinion on the issue presented. Dr. Perry stated that it was unlikely a visible tumor was missed by the 2001 colonoscopy, without fully explaining how this related to the issue of causal relationship. He then stated, “While there is an interaction between mutagen exposure and genetic constitution at this time we cannot tell whether his exposures contributed in any way to the development of his colon cancer.” This equivocal statement does not constitute a rationalized medical opinion. While Dr. Perry noted a positive family history for cancer and the lack of an oncology literature establishing asbestos as a carcinogen for colon cancer, he did not clearly state whether appellant’s colon cancer was causally related to the accepted employment exposures. The second opinion physician Dr. Gray, for example, had noted the family history but he stated that he did not believe it was a factor in the employee’s cancer. If Dr. Perry felt the family history or other factors were important to the causal relationship issue then he must provide some explanation. He did not have provide an opinion of reasonable medical certainty. To resolve the conflict, however, Dr. Perry must provide a clearly stated opinion that is supported by medical rationale. The case will be remanded to the Office to request clarification from Dr. Perry. It should secure a rationalized medical opinion on the causal relationship between the employee’s colon cancer and the identified employment factors. After such further development as the Office deems necessary, it should issue an appropriate decision.

As to the claim for a respiratory condition, the Board finds the weight of the evidence was represented by Dr. Beller. Dr. Martin had described what he felt was a lung dysfunction, without providing a clear diagnosis or a rationalized medical opinion. Dr. Teitelbaum referred to occupational asthma in his November 2, 2006 report, without discussing in detail the relevant medical history regarding a diagnosed asthma condition. He referred to both an aggravation of preexisting asthma as well as a new occupational asthma, without clearly explaining his opinion on causal relationship with employment. Dr. Teitelbaum did not provide a rationalized medical opinion based on a complete background. The second opinion physician, Dr. Beller, provided a medical opinion with supporting medical rationale. He explained that asbestos required a long exposure period, found the decrease in lung function to clinically insignificant and found no diagnosed respiratory condition was causally related to the employment exposures. Dr. Beller’s report therefore represents the weight of the evidence on this issue.

CONCLUSION

The case will be remanded to the Office to properly resolve the conflict in the medical evidence on the issue on causal relationship between the employee’s colon cancer and federal employment. The evidence of record does not establish a respiratory condition causally related to the identified employment exposures.

⁹ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 30, 2007 is set aside on the issue of causal relationship between colon cancer and federal employment and remanded for further action consistent with this decision of the Board. The August 30, 2007 decision is affirmed with respect to a respiratory condition.

Issued: November 4, 2008
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