U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICKY KIMBRELL and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION AERONAUTICAL CENTER, Oklahoma City, Okla.

Docket No. 97-2407; Submitted on the Record;
Issued May 7, 1999

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that he sustained an injury causally related to factors of his federal employment.

The Board has duly reviewed the case record in this appeal and finds that the case is not in posture for decision.

On May 10, 1991 appellant, then an aircraft pneudraulic systems mechanic, filed a claim for an occupational disease (Form CA-2) alleging that on October 16, 1990 he first became aware of his rash, headaches and shortness of breath. Appellant further alleged that on February 12, 1991 he first realized that his conditions were caused or aggravated by his employment. Appellant stated that he worked with hazardous materials and different chemicals in the performance of his work duties. The Office of Workers' Compensation Programs accepted appellant's claim for temporary aggravation of dermatitis. On June 22, 1995 appellant filed a claim (Form CA-2a) alleging that he sustained a recurrence of disability on May 8, 1995. Appellant alleged that his lung cancer was caused by the accepted employment injury. By decision dated August 22, 1995, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability. In an August 29, 1995 letter, appellant, through his counsel, requested an oral hearing before an Office representative. By decision dated December 6, 1995, the hearing representative vacated the Office's August 22, 1995 decision and remanded the case to the Office for further development of the factual and medical evidence for appellant's new injury. On remand, the Office found the evidence of record insufficient to establish that the claimed medical condition was caused by factors of appellant's employment in a decision dated April 16, 1996, based on the medical opinion of Dr. Richard Bottomley, a Board-certified internist and second opinion physician. In an April 26, 1996 letter, appellant, through his counsel, requested an oral hearing. By decision dated April 13, 1997, the hearing representative affirmed the Office's April 16, 1996 decision.

Section 8123(a) of the Federal Employees' Compensation Act 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 an examination.[1]

In this case, the Office referred appellant along with a statement of accepted facts, a list of specific questions and medical records to Dr. Bottomley for a second opinion examination. In an April 9, 1996 medical report, he stated:

> "[w]hether [appellant's] adenocarcinoma is related to his chemical exposure is impossible to say. Approximately 85 percent of carcinomas of the lung are related to environmental exposures including smoking and approximately 15 percent are as far as we know, unrelated to exposure. The delay in exposure to most carcinogens and the development of cancer is between 10 and 20 years. I feel that it is very unlikely that [appellant's] lung carcinoma is related to his chemical exposure."

Dr. James R. McCurdy, a Board-certified thoracic surgeon and appellant's treating physician, disagreed with Dr. Bottomley's assessment regarding the delay in exposure to most carcinogens and the development of lung cancer in a January 22, 1997 medical report. Further, in this report, he opined that there were exceptions to every rule and that appellant's "lung cancer could very well have been related to his chemical exposure from October 1990 to April 1991." Although both Dr. Bottomley's and Dr. McCurdy's opinions are equivocal as to whether appellant's lung carcinoma was caused by factors of his employment, they are sufficient to create a conflict[2] in the medical opinion evidence. Therefore, the case will be remanded to the Office.

On remand, the Office should prepare a statement of accepted facts and refer it, together with appellant and the case record, to a Board-certified specialist in the appropriate field of medicine, to resolve the conflict pursuant to section 8123(a) of the Act. Following this and such further development as the Office deems necessary, a *de novo* decision should be issued on appellant's claim.

[1] 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

[2] *Phillip J. Deroo*, 39 ECAB 1294 (1988); *Margaret A. Donnelly*, 15 ECAB 40 (1963); *Morris Scanlon*, 11 ECAB 384 (1960).

The April 13, 1997 decision of the Office of Workers' Compensation Programs hearing representative is hereby set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
May 7, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member