

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WARREN M. WALKER and DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD, Portsmouth, VA

*Docket No. 02-1105; Submitted on the Record;
Issued September 11, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has asbestosis causally related to factors of his employment.

On August 26, 1998 appellant, then a 55-year-old crane operator, filed a claim for asbestosis which he related to exposure in his federal and private employment. He had stopped working at the employing establishment on April 15, 1993 due to an employment injury. Appellant stated that he first realized that his condition was related to his employment on August 29, 1995. The employing establishment indicated that appellant worked from November 1975 to August 1994 and would have been exposed to ambient airborne asbestos.

Appellant submitted an August 29, 1995 report from Dr. James Scutero, a Board-certified pulmonologist, who stated that pulmonary function tests showed a reduced diffusion capacity indicating a decrease in alveolar surface area for gas exchange. He reported that chest x-rays showed increased markings at both bases consistent with pulmonary fibrosis. On the basis of these tests, Dr. Scutero diagnosed asbestosis.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. George Grayson, a Board-certified internist, for an examination and second opinion. In a February 15, 1999 report, Dr. Grayson stated that chest x-rays showed no significant abnormality. He noted that Dr. Scutero had stated appellant had pulmonary fibrosis. Dr. Grayson noted, however, that he could not see it on the x-rays taken in his office or on Dr. Scutero's x-rays. He reported that pulmonary function tests were done with difficulty and the diffusion capacity could not be done because appellant could not hold his breath. Dr. Grayson indicated that it was possible appellant had asbestosis that he could not see on x-rays, but Dr. Scutero could see. He stated that if appellant did have asbestosis, it was not contributing to his breathing problems. Dr. Grayson concluded that appellant had upper airways disease which was significantly affecting his breathing. He indicated that the upper airways disease was not related to appellant's employment.

In a May 7, 1999 decision, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that causal relationship had not been established between appellant's condition and his employment.

Appellant requested a hearing before an Office hearing representative. In a December 10, 1999 decision, issued without a hearing, the Office hearing representative stated that Dr. Grayson's report was speculative and did not provide an opinion on whether appellant had asbestosis that was causally related to his federal employment. She also noted that the statement of accepted facts did not separate appellant's private employment from his federal employment. She therefore, remanded the case to the Office for correction of the statement of accepted facts and referral of the case to Dr. Grayson for a supplemental opinion on whether appellant had asbestosis and, if so, whether it was related to his federal employment.

The Office submitted the amended statement of facts to Dr. Grayson and requested a clarification of his opinion. In a February 14, 2000 note, he stated that there was no evidence to support a diagnosis of asbestosis, despite a history of exposure. Dr. Grayson noted that Dr. Scutero diagnosed asbestosis on the basis of his x-rays but stated that the x-rays he obtained did not support that diagnosis.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Charles Donlan, a Board-certified pulmonologist, to resolve the conflict in the medical evidence. In an April 20, 2000 report, he submitted a x-ray report which stated that appellant had mild chronic pulmonary disease without acute infiltrate or process. Dr. Donlan stated that pulmonary function tests showed a mild obstructive impairment. He indicated that appellant had normal lung capacity and normal diffusion capacity. Dr. Donlan diagnosed chronic bronchitis. He stated that there was no evidence of clinical asbestosis.

In a May 10, 2000 decision, the Office denied appellant's claim on the grounds that the weight of the medical evidence established that he had not sustained asbestosis as a result of his federal employment.

Appellant requested a hearing before an Office hearing representative but subsequently modified his request to a review of the written record. In a February 27, 2001 decision, an Office hearing representative affirmed the Office's May 10, 2000 decision.

The Board finds that appellant has not met his burden of proof in establishing that he has asbestosis causally related to factors of his federal employment.

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;¹ (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;² and (3) medical evidence establishing that

¹ See *Ronald K. White*, 37 ECAB 176, 178 (1985).

² See *Walter D. Morehead*, 31 ECAB 188, 194 (1979).

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 diagnosed condition is causally related to the employment factors identified by the claimant.³ The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant,⁴ must be one of reasonable medical certainty⁵ 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.⁶

In this case, a conflict in the medical evidence was created on whether appellant had asbestosis. To resolve the conflict, the Office referred appellant to Dr. Donlan, who acted as an impartial medical specialist. Dr. Donlan noted that appellant had chronic bronchitis but did not have any evidence from x-rays, pulmonary functions tests or diffusion capacity tests that would establish a diagnosis of asbestosis. He therefore, concluded that appellant did not have asbestosis. In situations when there exists opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁷ In this case, Dr. Donlan had an accurate history of appellant's employment and performed a thorough examination. He concluded from his examination that appellant did not have asbestosis. Dr. Donlan's report, therefore, is entitled to special weight and, in the context of this case, constitutes the weight of the medical evidence. The weight of the medical evidence shows that appellant does not have the condition for which he sought compensation. He therefore, has not met his burden of proof.

³ See generally *Lloyd C. Wiggs*, 32 ECAB 1023, 1029 (1981).

⁴ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁵ See *Morris Scanlon*, 11 ECAB 384, 385 (1960).

⁶ See *William E. Enright*, 31 ECAB 426, 430 (1980).

⁷ *James P. Roberts*, 31 ECAB 1010 (1980).

The decision of the Office of Workers' Compensation Programs dated February 27, 2001 is hereby affirmed.

Dated, Washington, DC
September 11, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member