United States Department of Labor
Employees' Compensation Appeals Board

ROBERT W. WEST, Appellant	)	
and	)	**Docket No. 06-906**
	)	**Issued: July 20, 2006**
TENNESSEE VALLEY AUTHORITY, PARADISE FOSSIL PLANT, Drakesboro, KY, 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, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 9, 2006 appellant filed a timely appeal from a December 15, 2005 decision of the Office of Workers' Compensation Programs affirming the denial of his claim for occupational lung disease. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant sustained a pulmonary condition in the performance of duty.

FACTUAL HISTORY

On January 9, 2003 appellant, then a 54-year-old former machinist foreman, filed a notice of occupational disease (Form CA-2) claiming that he sustained asbestosis and chronic obstructive pulmonary disease in the performance of duty. Appellant retired from the employing establishment on January 4, 1999. He explained that, although he had a 10-year history of

respiratory difficulties, he was not diagnosed with an occupationally-related lung condition until November 1, 2002.[1] The employing establishment asserted that appellant's claim was not timely filed under the three-year time limitation of section 8122 of the Federal Employees' Compensation Act, as appellant filed his claim more than three years after his last exposure to the implicated work factors and did not notify his supervisor of the claimed conditions until October 8, 2003.[2] The employing establishment contended that appellant could not have contracted occupational pneumoconiosis as his exposures to coal dust and asbestos were below the permissible limits set by the Department of Labor's Occupational Safety and Health Administration.

Appellant participated in an employing establishment pulmonary monitoring program during periods of exposure to coal dust. In forms dated from October 12, 1970 to February 25, 1972, he checked boxes that indicated he smoked cigarettes. In May 23, 1979 and June 20, 1985 questionnaires, he indicated that he had respiratory problems and continued to smoke. Dr. S. Hew Morrow, a physician providing services to the employing establishment, opined that a July 3, 1985 "Routine Chest Film" performed by the employing establishment showed "[m]inimal bilateral pleural thickening" and "[c]alcifications residual to healed granulomatous disease, probably histoplasmosis." In a July 18, 1985 form letter, Dr. C. Wallace, an employing establishment physician, advised appellant that his chest x-ray was "outside normal limits." Dr. Wallace advised appellant to "stop smoking."[3] A July 10, 1987 "routine" chest x-ray performed by the employing establishment was normal.

In a November 20, 2002 report, Dr. William C. Houser, an attending Board-certified pulmonologist, related appellant's account of workplace exposures to asbestos, coal dust and flue gas. He related appellant's account of a 10-year history of coughing and shortness of breath, an episode of pleurisy in the early 1980s and a 36-year history of cigarette smoking. Dr. Houser obtained chest x-rays and pulmonary function studies. He found left diaphragmatic plaque "most likely secondary to prior asbestos exposure." Dr. Houser diagnosed mild chronic obstructive

[1] In a November 1, 2002 letter, appellant advised the employing establishment that he had "just been advised by a physician for the first time that [he had] an occupational lung disease as a result of working" at the employing establishment.

[2] 5 U.S.C. § 8122. The Board notes that, while appellant filed his claim more than three years after his last exposure to the implicated factors, his claim is still timely. 5 U.S.C. § 8122(b) provides that, in latent disability cases, the time limitation does not begin to run until the claimant is aware or by the exercise of reasonable diligence should have been aware, of the causal relationship between the employment and the compensable disability. The Board has held that, with regard to the latent condition of asbestos-related pulmonary disease, an employee's "concern" with regard to his history of asbestos exposure at work is not sufficient to begin the three-year time period for filing a claim without positive medical evidence diagnosing an asbestos-related respiratory condition and raising the possibility that exposure to asbestos in the workplace caused or contributed to that condition. *Edward C. Hornor*, 43 ECAB 834 (1992) (distinguishing other cases). *See also Arbie L. Hampton* (Docket No. 05-1179, issued August 16, 2005). In this case, there is no evidence that appellant received a diagnosis of an asbestos-related pulmonary condition until November 1, 2002. He filed his claim on January 9, 2003, within three years of this diagnosis. Therefore, his claim is timely filed.

[3] Dr. Wallace's other recommendations and his description of the x-ray findings are illegible.

pulmonary disease (COPD) and chronic bronchitis due to exposure to asbestos, coal dust, flue gas, welding fumes, smoke, trichloroethylene and cigarette smoke.[4]

The Office referred appellant to Dr. Kenneth C. Anderson, a physician specializing in pulmonary medicine, for a second opinion examination. After obtaining pulmonary function studies and chest x-rays, Dr. Anderson submitted a November 16, 2004 report diagnosing Stage 1, mild COPD, pneumoconiosis and asbestos-related pulmonary disease. Following additional studies of appellant's lungs interpreted by Dr. Leslie K. Tutt, a Board-certified diagnostic radiologist, Dr. Anderson opined in a January 4, 2005 report that there were no calcified pleural plaques or pulmonary fibrosis indicating pneumoconiosis. He concluded that appellant had mild COPD due to smoking.

By decision dated January 10, 2005, the Office denied appellant's claim on the grounds that causal relationship was not established, based on Dr. Anderson's report as the weight of the medical evidence.

In a January 20, 2005 letter, appellant requested an oral hearing, held October 25, 2005. At the hearing, appellant reiterated his 12-year history of shortness of breath, wheezing and occasional coughing, noting that he smoked one-and-a-half packs of cigarettes a day for 36 years.[5] After the hearing, appellant submitted an October 18, 2005 report from Dr. Houser opining that the November 16, 2004 pulmonary function studies showed a 17.5 percent impairment of the whole person according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

By decision dated and finalized December 15, 2005, an Office hearing representative affirmed the Office's January 10, 2005 decision, finding that appellant had not established that he sustained a work-related lung condition as he submitted insufficient medical evidence to establish causal relationship. The Office found that Dr. Anderson's report represented the weight of the medical evidence.

LEGAL PRECEDENT

An employee seeking benefits under the Act[6] 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 the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the

[4] On June 25, 2004 appellant claimed a schedule award for lung impairment. In a June 29, 2004 letter, the Office advised appellant of the additional medical and factual evidence needed to establish his claim. In response, appellant submitted a July 20, 2004 letter noting that, from 2000 to 2004, he worked for two to four months a year as a contractor at the employing establishment, with brief exposures to coal dust and cleaning solvents. There is no decision of record regarding the schedule award claim.

[5] In a November 22, 2005 brief, appellant reiterated that he had "respiratory problems in the form of shortness of breath and cough for approximately a dozen years."

[6] 5 U.S.C. §§ 8101-8193.

employment injury.[7] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[8]

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) 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 diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship is generally 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, must be one of reasonable medial 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.[9]

ANALYSIS

Appellant claimed that he sustained asbestosis and COPD due to workplace exposures to coal dust, asbestos, fumes and gases. In support of his claim, appellant submitted a November 20, 2002 report from Dr. Houser, an attending Board-certified pulmonologist. He opined that appellant sustained asbestos-related lung disease and COPD due to occupational exposures to asbestos, coal dust, welding fumes and solvents. The Office obtained a second opinion from Dr. Anderson, a physician specializing in pulmonary medicine. Dr. Anderson opined that appellant had COPD due to smoking. The Office denied appellant's claim, finding Dr. Anderson's opinion as the weight of the medical evidence. The Office affirmed this denial by decision dated and finalized December 15, 2005. The Board finds that there is a conflict of medical opinion between Dr. Houser, for appellant and Dr. Anderson, for the government, regarding the presence and etiology of the claimed pulmonary conditions.

The Act, at 5 U.S.C. § 8123, states 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. Therefore, the case must be remanded to the Office for appointment of an impartial medical examiner to determine whether appellant sustained pneumoconiosis and COPD in the performance of duty. After this and all other development deemed necessary, the Office shall issue an appropriate decision in the case.

[7] *Joe D. Cameron*, 41 ECAB 153 (1989).

[8] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[9] *Solomon Polen*, 51 ECAB 341 (2000).

CONCLUSION

The Board finds that the case is not in posture for a decision as the case must be remanded to the Office for appointment of an impartial medical examiner to resolve a conflict of medical opinion, to be followed by issuance of an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 15, 2005 is set aside and the case remanded to the Office for further development consistent with this decision and order.

Issued: July 20, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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