

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

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**L.J., Appellant**

**and**

**TENNESSEE VALLEY AUTHORITY,  
Drakesboro, KY, Employer**

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**Docket No. 08-1602  
Issued: January 23, 2009**

*Appearances:*  
*Ronald K. Bruce, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 19, 2008 appellant, through his counsel, filed a timely appeal from a March 28, 2008 merit decision of the Office of Workers' Compensation Programs denying his claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

**ISSUE**

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

**FACTUAL HISTORY**

On August 9, 2005 appellant, then a 58-year-old former developmental production supervisor, filed an occupational disease claim alleging that he sustained pneumoconiosis as a result of his federal employment. In a statement accompanying the claim, he advised that he worked with the employing establishment in various positions from October 1968 through June 2000. Appellant noted that at various times during this employment he was exposed to coal

dust, flue gas, asbestos and limestone dust. He farmed from 1970 to 1979 and was exposed to dirt dust. After appellant's federal employment, he had occasional exposure to aluminum dust while working for LC&E from May 2001 through March 2002 and had exposure to coal dust while working for Power Industry Consultants from April through November 2002. He noted that he smoked cigarettes for 20 years at a rate of one to two packs per day and occasionally, three packs a day. By letter dated November 30, 2006, the employing establishment controverted the claim alleging that the medical evidence failed to show that appellant's condition was due to his federal employment.

In a medical report dated June 29, 2005, Dr. Glen Baker, a Board-certified internist and pulmonologist, diagnosed appellant with "mixed pneumoconiosis with irregular changes most likely due to pulmonary asbestosis category 1/0, on the basis of 2000 ILO Classification" and mild bronchitis based on history.<sup>1</sup>

By letter dated November 15, 2006, the Office referred appellant to Dr. Kenneth Anderson, a Board-certified pulmonologist and a B-reader, for a second opinion. In a medical report dated December 5, 2006, Dr. Anderson noted that appellant did not appear to produce enough sputum to suggest a diagnosis of chronic bronchitis. Pulmonary function tests revealed early obstructive airway disease, peripheral airways dysfunction and hyperinflation. However, Dr. Anderson noted that appellant had normal diffusion capacity of carbon monoxide which ruled out entities such as emphysema and/or significant pneumoconiosis. He stated that, even taking into account appellant's tobacco history, he did not demonstrate findings to suggest chronic obstructive lung disease.

In a decision dated January 31, 2007, the Office denied appellant's claim. It found that there was insufficient evidence to establish that his exposures occurred as alleged. The Office further found that there was no medical evidence that connected a diagnosis to the claimed exposures.

On February 13, 2007 appellant, through his attorney, requested an oral hearing. This was later changed to a request for review of the written record.

Appellant submitted the results of a May 7, 2007 x-ray interpreted by Dr. Matthew A. Vuskovich, a Board-certified specialist in occupational medicine as showing small particles with a 1/1 profusion. He found that there were no pleural abnormalities consistent with pneumoconiosis.

By decision dated May 9, 2007, the Office hearing representative remanded the case to resolve a conflict in medical evidence.

By letter dated May 17, 2007, the Office referred appellant to Dr. Manjoj Majmudar, a Board-certified pulmonologist, for an impartial medical examination, to resolve a conflict in opinion between Drs. Baker and Anderson with regard to whether there was "medical evidence

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<sup>1</sup> Under 5 U.S.C. § 8122(b), appellant has three years from the date he knew or should have known of the causal relationship of any disability and his employment to file a claim. As this appears to be the first report diagnosing pneumoconiosis, this claim was timely filed.

sufficient to support a relationship between diagnosis and the employment. In a report dated July 5, 2007, Dr. Majmudar noted that appellant's pulmonary function test showed no significant obstructive airway impairment and that his diffusion capacity was normal. He further noted that appellant probably had mild hyperinflation. Dr. Majmudar opined that appellant's shortness of breath and pulmonary symptoms were most likely related to his 50-pack year smoking history. He noted that there was no clinical evidence suggestive of pneumoconiosis or asbestosis at the present time. Dr. Majmudar reported no significant pulmonary impairment on pulmonary function test basis and that appellant's chest x-ray was not significant for any pneumoconiosis or any pleural disease. He also noted a history suggestive of sleep apnea and recommended an overnight polysomnography to rule out obstructive sleep apnea.

On July 25, 2007 the Office denied appellant's claim as he had not established that he sustained a pulmonary condition related to the established work-related exposure of May 20, 2005.

On August 7, 2007 appellant, through his attorney, requested an oral hearing.

On March 3, 2008 appellant alleged that Dr. Majmudar was insufficient to serve as an independent medical examiner because he was not a certified B-reader.

In a decision dated March 28, 2008, the hearing representative nonetheless affirmed the July 25, 2007 decision denying appellant's claim.

### **LEGAL PRECEDENT**

An employee seeking compensation under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,<sup>3</sup> including that he is an "employee" within the meaning of the Act<sup>4</sup> and that he filed his claim within the applicable time limitation.<sup>5</sup> The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.<sup>6</sup> 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.<sup>7</sup>

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *J.P.*, 59 ECAB \_\_\_\_ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

<sup>4</sup> *See M.H.*, 59 ECAB \_\_\_\_ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

<sup>5</sup> *R.C.*, 59 ECAB \_\_\_\_ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

<sup>6</sup> *G.T.*, 59 ECAB \_\_\_\_ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>7</sup> *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.<sup>8</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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.<sup>9</sup>

Section 8123 of the Act provides 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.<sup>10</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical 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.<sup>11</sup>

### ANALYSIS

Appellant alleged that employment exposures to dust, gas and chemicals caused or contributed to his claimed condition of pneumoconiosis. However, his claim was denied as the medical evidence failed to establish that he sustained a diagnosed medical condition causally related to the specified employment factors.

A conflict in medical opinion arose between appellant's physician, Dr. Baker, who found that appellant had mixed pneumoconiosis with irregular changes most likely due to pulmonary asbestosis category 1/0 and the second opinion physician, Dr. Anderson, who noted that he demonstrated a normal diffusion capacity of carbon monoxide which ruled out emphysema and/or significant pneumoconiosis. In order to resolve the conflict between the opinions of Drs. Baker and Anderson, the Office referred appellant to Dr. Majmudar, selected as the impartial medical specialist. He reviewed a history of appellant's occupational exposures and presented findings on physical examination. Dr. Majmudar noted that pulmonary function tests

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<sup>8</sup> See *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

<sup>9</sup> *I.J.*, 59 ECAB \_\_\_\_ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>10</sup> 5 U.S.C. § 8123; see *Charles S. Hamilton*, 52 ECAB 110 (2000).

<sup>11</sup> *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

showed normal spirometry with normal diffusion capacity. He found that appellant's pulmonary symptoms were most likely related to a 50-pack-a-year smoking history and that there was no clinical evidence suggestive of pneumoconiosis or asbestosis. Dr. Majmudar also noted no significant pulmonary impairment on pulmonary function tests and that appellant's chest x-ray was not significant for any pneumoconiosis or pleural disease. Dr. Majmudar noted that appellant probably had a mildly hyperinflated lung, but no pneumoconiosis or any pleural disease. The Board finds that Dr. Majmudar's report is based on an accurate history and supported by rationale explaining why appellant's examination and diagnostic testing excluded the claimed condition of pneumoconiosis constitutes the special weight of the medical evidence and is sufficient to resolve the conflict in medical opinion.

Appellant's attorney contends that Dr. Majmudar was not qualified to examine appellant as he is not a certified B-reader. This argument is without merit. Neither the Act nor the Office regulations impose such a restriction.<sup>12</sup> Office procedures do not require NIOSH B-reader certification. Dr. Majmudar is a Board-certified specialist in the appropriate field. When a case is referred to the impartial medical examiner to resolve a conflict in the medical evidence, the opinion of the impartial medical examiner is entitled to special weight.<sup>13</sup> The Board notes that, only one physician who was a B-reader, Dr. Baker, found that appellant had pneumoconiosis. Dr. Vuskovich did not find pleural abnormalities consistent with pneumoconiosis and Dr. Anderson ruled out any significant pneumoconiosis. As noted, Dr. Majmudar's report constitutes the special weight of the medical evidence and establishes that appellant does not have pneumoconiosis related to his federal employment. As the special weight of the medical evidence fails to establish that appellant sustained any pulmonary condition as a result of his exposure to dust during his federal employment, the Board finds that the Office properly denied appellant's claim for compensation.

### CONCLUSION

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

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<sup>12</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(b) (September 1994 and December 1995), (Exhibit 7) (December 1994).

<sup>13</sup> *Darlene R. Kennedy*, 57 ECAB 414 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 28, 2008 is affirmed.

Issued: January 23, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board