United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 10-2408**
	)	**Issued: July 8, 2011**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, San Diego, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 24, 2010 appellant filed a timely appeal of the April 19, 2010 merit decision of the Office of Workers' Compensation Programs denying his occupational disease claim and the August 19, 2010 nonmerit decision, which found that he abandoned his request for an oral hearing. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty; and (2) whether he abandoned his request for an oral hearing.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 12, 2010 appellant, then a 55-year-old aviation safety inspector, filed an occupational disease claim alleging that he developed chronic bronchitis and a scar on his lung due to exposure to toxins in his work environment. He submitted a January 30, 2010 report from Dr. Nina L. Niemeyer, a treating physician, which provided a diagnosis of bronchitis. Appellant also submitted a listing of six days he worked on site as an accident investigator from February 1, 2003 through September 16, 2009.

In a March 15, 2010 letter, the Office informed appellant that the information submitted was not insufficient to establish his claim and advised him to provide additional factual information describing the type of exposure claimed to have caused his diagnosed condition. Appellant was also advised to submit a medical report containing an opinion on the causal relationship between the claimed exposure and his diagnosed condition.

The employing establishment submitted a chronological record of medical care from October 16, 2003 through February 17, 2010. Notes dated February 17, 2010 from Dr. J.K. Frazier reflected a diagnosis of chronic bronchitis and a spot on the left lung. The record contains a report of a March 15, 2010 computerized tomography (CT) scan of the chest, abdomen and pelvis.

In a March 30, 2010 statement, appellant described his exposure to aircraft fumes, smoke, burnt petroleum and oil, rubber, fabrics, plastics, aluminum, other metals, and wiring while investigating numerous aircraft accidents since 2002. He noted that the standard dust mask provided is not useful in an oxygen deprived environment, or when the contaminants in the air exceed 10 times the Permissible Exposure Limit (PEL). Appellant's tasks involved sifting through the aircraft wreckage to determine a cause or contributing cause of the accident. He estimated that on average he investigated aircraft accidents/incidents five hours every two weeks. Appellant alleged that his chronic bronchitis developed due to his exposure to the toxins and that he did not have this condition prior to his employment. He submitted a position description for an aviation safety inspector.

On April 6, 2010 the employing establishment confirmed that appellant did participate in accident investigations on the dates claimed but denied any knowledge of his exposure to fumes, dust or chemicals during or following the accident investigations, noting that all accident investigations were conducted outdoors. While on site, appellant reportedly would view the wreckage to try to determine how and why the accident occurred, but never advised management that he experienced exposure or contact with a harmful substance during an accident investigation.

In an April 19, 2010 decision, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish that the claimed medical condition resulted from the accepted exposure to toxic dusts, fumes and smokes while performing his duties as aviation safety inspector.

On April 27, 2010 appellant requested a telephonic hearing. The envelope which contained the hearing request contained appellant's return address, which was identical to the address provided by appellant on his CA-2 form.

In a May 18, 2010 letter, which was mailed to his address of record, the Office informed appellant that his request for oral hearing had been received. In a June 24, 2010 letter, which was also mailed to his address of record, the Office informed appellant that a telephonic hearing had been scheduled for August 4, 2010 at 1:00 p.m. Eastern Time and described in detail the procedure he should follow in order to participate in the scheduled hearing.

In an August 19, 2010 decision, the Office found that appellant abandoned his request for a hearing. It noted that appellant failed to appear at the hearing and that the record gave no indication that he had contacted the Office either prior or subsequent to the scheduled hearing to explain his failure to appear.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act[2] 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 employment injury.[3] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

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;[5] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[6] and (3) medical evidence establishing 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.[7]

Generally, causal relationship may be established only by rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's

[2] 5 U.S.C. §§ 8101-8193.

[3] *Caroline Thomas*, 51 ECAB 451 (2000); *Elaine Pendleton*, 40 ECAB 1143 (1989).

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

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

[6] *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[7] *Ernest St. Pierre*, 51 ECAB 623 (2000).

diagnosed condition and the implicated employment factors.[8] The opinion of the physician must be based on a complete factual and medical background of the claimant,[9] must be one of reasonable medical certainty[10] 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.[11]

ANALYSIS -- ISSUE 1

The medical evidence submitted by appellant is insufficient to establish that his diagnosed medical condition was caused or aggravated by factors of his federal employment. Therefore, he has failed to meet his burden of proof.

The medical evidence of record consists of a January 30, 2010 report from Dr. Nina L. Niemeyer; a chronological record of medical care from the employing establishment for the period October 16, 2003 through February 17, 2010; February 17, 2010 notes from Dr. Frazier; and a report of a March 15, 2010 CT scan of the chest, abdomen and pelvis. Dr. Niemeyer provided a diagnosis of bronchitis. Dr. Frazier diagnosed chronic bronchitis and a spot on the left lung. Neither physician, however, provided an opinion as to the cause of appellant's diagnosed condition, nor did they describe appellant's job duties or explain the medical process through which such duties would have been competent to cause the claimed condition. Therefore, these reports are of limited probative value.[12] The remaining medical evidence, which includes test results, notes and disability slips that do not contain a definitive diagnosis or any opinion on the cause of appellant's condition are of limited probative value and insufficient to establish appellant's claim

Appellant expressed his belief that his condition resulted from his duties as an aviation safety inspector. The Board has held, however, that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[13] Neither the fact that the condition became apparent during a period of employment, nor the belief that the condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.[14] Causal relationship must be substantiated by reasoned medical opinion evidence, which it is appellant's responsibility to

[8] *Conard Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

[9] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[10] *John W. Montoya*, 54 ECAB 306 (2003).

[11] *Judy C. Rogers*, 54 ECAB 693 (2003).

[12] Medical evidence which does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. *A.D.*, 58 ECAB 149 (2006); *Michael E. Smith*, *supra* note 4. Medical conclusions unsupported by rationale are of little probative value. *Willa M. Frazier*, 55 ECAB 379 (2004).

[13] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[14] *Id.*

submit. Therefore, appellant's belief that his condition was caused by the alleged work-related exposure is not determinative.

The Office advised appellant that it was his responsibility to provide a comprehensive medical report which described his symptoms, test results, diagnosis, treatment and the doctor's opinion, with medical reasons, on the cause of his condition. Appellant failed to do so. As there is no probative, rationalized medical evidence addressing how appellant's claimed condition was caused or aggravated by his employment, he has not met his burden of proof to establish that he sustained an occupational disease in the performance of duty causally related to factors of employment.

LEGAL PRECEDENT -- ISSUE 2

With respect to abandonment of hearing requests, Chapter 2.1601.6(e) of the Office's procedure manual provides in relevant part:

> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.
>
> "Under these circumstances, [the Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [district Office]....
>
> "(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, [the Branch of Hearings and Review] should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.
>
> "This course of action is correct even if [the Branch of Hearings and Review] can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[15]

Section 10.617(b) of the Office's regulations provide that unless otherwise directed in writing by the claimant, the hearing representative will mail a notice of the time and place of the oral hearing to the claimant and any representative at least 30 days before the scheduled date.[16] The Office has the burden of proving that it mailed the claimant a notice of the date and time of

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999); *see also Claudia J. Whitten*, 52 ECAB 483, 484-85 (2001).

[16] 20 C.F.R. § 10.617(b).

the scheduled hearing.[17] In the absence of evidence to the contrary, it is presumed that a notice mailed in the ordinary course of business was received in due course by the intended recipient.[18]

ANALYSIS -- ISSUE 2

The record establishes that on June 24, 2010 in response to appellant's timely request for a hearing, the Branch of Hearings and Review mailed an appropriate notice of the scheduled telephonic hearing to be held on August 4, 2010 at 1:00 p.m. Eastern Time. The hearing notice was properly mailed to his address of record. The Board notes that the notice was sent more than 30 days prior to the scheduled hearing date of August 4, 2010. The record establishes that appellant did not call at the appointed time. In addition, appellant failed to request a postponement of the hearing or explain his failure to appear at the hearing within 10 days of the scheduled hearing. As all three conditions are met, the Board finds that appellant abandoned his request for a hearing.[19]

On appeal, appellant contends that he did not attend the hearing because he did not receive the Office's June 24, 2010 notice. The record establishes, however, that notice was mailed in the ordinary course of business to appellant's address of record, and there is no evidence to the contrary. Therefore, it is presumed that the notice was received in due course by appellant.[20]

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he developed an occupational disease in the performance of duty. The Board further finds that he abandoned his request for an oral hearing.

[17] *Nelson R. Hubbard*, 54 ECAB 156 (2002). In the absence of evidence to the contrary, it is presumed that a notice mailed in the ordinary course of business was received in due course by the intended recipient.

[18] *Kenneth E. Harris*, 54 ECAB 502, 505 (2003). This presumption is commonly referred to as the mailbox rule. and arises when the record reflects that the notice was properly addressed and duly mailed. *Id.*

[19] *See C.T.*, Docket No. 08-2160 (issued May 7, 2009).

[20] *See supra* note 18 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the August 19 and April 19, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 8, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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