

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TONY REED and DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD, Long Beach, Calif.

*Docket No. 97-2050; Submitted on the Record;
Issued April 6, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof in establishing that he has a pulmonary condition causally related to exposure to asbestos at work.

On May 13, 1996 appellant, then 44 years old, indicated that he had been exposed to asbestos while working at the employing establishment from 1981 to 1986 as a boilermaker apprentice. He filed a claim for asbestos lung disease. He subsequently indicated that he had not been aware that he was exposed to asbestos until November 21, 1995.

In a September 17, 1996 decision, the Office of Workers' Compensation Programs rejected appellant's claim on the grounds that the weight of the medical evidence established that there was no pulmonary condition arising out of and in the course of his federal employment duties. In a May 23, 1997 decision, the Office denied appellant's request for a hearing before an Office hearing representative as untimely. The Office considered the request within its own discretion and denied the request for a hearing on the grounds that the issue could be equally well addressed by requesting reconsideration and submitting evidence not previously considered.¹

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence.

In a November 21, 1995 report, Dr. Robert Lugliani, a pulmonologist, noted that appellant had a history of asbestos exposure, had a dry hacking cough, increasing shortness of breath and dyspnea on exertion, scattered rhonchi and crepitant bibasilar rales in both lower lung bases, restrictive components on his pulmonary function test and increased bibasilar interstitial fibrotic reaction on chest x-rays. Dr. Lugliani diagnosed underlying acute and chronic asthmatic

¹ Appellant's appeal was filed on June 9, 1997. In a letter received by the Office on June 10, 1997, appellant requested reconsideration from the Office which was denied in a June 11, 1997 decision. The Board and the Office may not have concurrent jurisdiction over the same issue at the same time. *Douglas Billings*, 41 ECAB 880 (1990). As appellant was seeking review of the same decision from the Office and the Board, the Office did not have jurisdiction in this case. The June 11, 1997 decision of the Office, therefore, is null and void.

bronchitis, possibly related to his history of smoking, possible asbestotic lung disease and a history of osteoarthritis. He recommended further testing.

In an August 21, 1996 report, Dr. Jeffrey B. Riker, a Board-certified pulmonologist, stated that appellant had no evidence on chest x-ray of asbestosis or pleural disease. He indicated that the pulmonary function tests showed mild small airways obstruction that was reversible after bronchodilator indicative of some mild bronchial asthma. Dr. Riker commented that appellant had no restrictive lung disease. He noted that appellant's diffusing capacity was mildly reduced but he did not have a hemoglobin to correct for it. Dr. Riker concluded, based on the recent history of exposure, the lack of x-ray abnormality and the minimal reduction of diffusing capacity, that he could not make a diagnosis of pulmonary asbestosis.

Dr. Lugliani and Dr. Riker reported different results on chest x-rays and pulmonary function tests. Dr. Lugliani stated that appellant had possible asbestos-related lung disease while Dr. Riker stated there was no evidence of pulmonary asbestos. The physicians' opinions therefore conflict on test results, interpretation of test results, diagnosis and whether appellant has any condition related to exposure to asbestos. The case must therefore be remanded for resolution of the conflict.

On remand the Office should refer appellant, together with the statement of accepted facts and the case record, to an appropriate impartial medical specialist for an examination. The specialist should be requested to perform the appropriate tests, provide a diagnosis of appellant's condition and give his opinion on whether appellant has any condition causally related to his exposure to asbestos at work. After further development as it may find necessary the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs, dated September 17, 1996, is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
April 6, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member