

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY M. KIPEN and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, Jacksonville, FL

*Docket No. 98-1027; Submitted on the Record;
Issued December 22, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly rescinded its acceptance of asbestosis and asbestos-related pleural disease.

On August 29, 1994 appellant filed a claim for asbestosis which he attributed to his exposure to asbestos while inspecting asbestos removals for the employing establishment. By decision dated May 10, 1995, the Office found that the evidence failed to establish a causal relation between appellant's condition and his employment. This decision was affirmed by an Office hearing representative in a May 20, 1996 decision.

By decision dated March 12, 1997, the Office vacated its prior decision, and found that the reports of Dr. Isabella K. Sharpe, appellant's attending physician, were sufficient to establish that appellant's asbestosis and asbestos-related pleural disease were causally related to his exposure to asbestos in his federal employment.

On July 17, 1997 the Office referred appellant, prior medical reports and a statement of accepted facts, to Dr. Sean Muldoon, who is Board-certified in pulmonary disease, for an opinion on the extent and degree of appellant's pulmonary condition and whether this condition was causally related to his exposure to asbestos in his federal employment. After receiving Dr. Muldoon's report, the Office, by decision dated January 23, 1998, found: "Your claim for compensation has been denied for the following reasons: (1) evidence of record does not establish that there is any employment-related disability as a result of asbestos exposure; (2) the evidence of record does not establish any permanent impairment of your lungs that would entitle you to schedule award benefits as the medical evidence was not sufficient to establish that your condition was caused by the employment factor, as required by the Federal Employees' Compensation Act."

Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides

that it erroneously accepted a claim.¹ Although the Office's January 23, 1998 decision does not state that the acceptance of appellant's claim is rescinded, this decision finds that the previously accepted conditions of asbestosis and asbestos-related pleural disease were not caused by appellant's employment. This constitutes a rescission of the acceptance of appellant's claim.

The Board finds that the Office did not meet its burden of proof to rescind the acceptance of appellant's claim due to the existence of a conflict of medical opinion.

In a report dated December 17, 1996, Dr. Sharpe, who is Board-certified in internal medicine and specializes in pulmonary disease, stated: "It is my impression that this gentleman has asbestosis and asbestos-related pleural disease. Also, it has advanced considerably in the past 2½ years so that his pulmonary function is considerably reduced. His exercise tolerance is also considerably reduced." With regard to causal relation, Dr. Sharpe stated: "The question of symptoms and their development and worsening related to time with any one employer is not easily appraised. The effect of asbestos is cumulative and so every exposure is important and none can be discounted." In a report dated January 25, 1997, Dr. Sharpe stated:

"All of these opinions are based on the standard of medical probability, in fact, at the level of reasonable medical certainty.

"(1) Yes, Mr. Kipen's asbestosis and asbestos-related pleural disease were aggravated and caused in part or in whole by his asbestos exposure during his federal civilian employment between 1984 and 1990.

"(2) He was exposed to asbestos during his federal employment. Asbestos exposure is cumulative and not reversible. It is in fact progressive. Asbestos exposure at any time during a life can be added to other asbestos exposure throughout life. Asbestos-related disease is related to time since first exposure and asbestosis is related to dose."

In a report dated September 2, 1997, Dr. Muldoon stated:

"IMPRESSION 61-year-old worker with asbestos exposure that was likely heavy during 45 days in 1955 to 1957, transient during brake and clutch work during 1962 to 1968² and continual but casual and likely low level from 1984 to 1990.

"There is concomitant heavy cigarette use that stopped about 10 years ago, evidence of reversible airway obstruction on the entire series of spirometry tempered by the possibility that effort was not up to par on the last two tests. There is no evidence of desaturation, there is no physical signs of asbestosis on examination. The CXR [chest x-ray] is not a normal CXR in my view but I am unable to identify the pleural plaques seen by some but not other readers.

¹ *Alfonso Martinisi*, 33 ECAB 841 (1982); *Jack W. West*, 30 ECAB 909 (1979).

² This exposure did not occur while appellant was a federal civilian employee.

“OPINION

“Of the asbestos-related pulmonary disease, the only one seen with any certainty is that suggesting interstitial fibrosis of a very mild degree. A similar pattern was noticed in 1989 and suggested in 1992 during which time spirometry was normal or super normal. This leaves significant doubt to whether the subtle interstitial pattern is significant.

“The possibility of pleural plaques was raised but not demonstrated on the current films. The plaques would not be expected as generally 20 or more years after initial exposure is required. While theoretically they may have occurred as a result of the exposure in 1955 the exposures in question from 1984 to 1990 would not lead to pleural plaques in 1988 to 1994.

“The issue of fibrotic asbestosis would not be considered to be a result of the exposure from 1984 to 1990 not being close to the typical latency of 20 years. It is possible the heavy exposure during 1955, though brief, could have led to some fibrosis that appeared in the late 1980’s, however, at this time 40 years post exposure, progression would not be anticipated.”

* * *

“In terms of concern with the exposures during his employment at [the employing establishment] there is insufficient data to support the diagnosis of work-related asbestosis, resulting from injury during that period.”

The opinions of Drs. Muldoon and Sharpe, both specialists in pulmonary disease, conflict on the question of whether appellant sustained asbestosis and asbestos-related pleural disease that is related to his exposure to asbestos in his federal employment. Due to this unresolved conflict of medical opinion, the Office has not met its burden of proof to rescind its acceptance of appellant’s claim.³

³ *George E. Reilly*, 44 ECAB 458 (1993).

The decision of the Office of Workers' Compensation Programs dated January 23, 1998 is reversed.

Dated, Washington, D.C.
December 22, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member