

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM B. NELMS and DEPARTMENT OF THE NAVY,
NAVAL CONSTRUCTION BATTALION CENTER, Gulfport, Miss.

*Docket No. 97-1595; Submitted on the Record;
Issued June 24, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T. C. THOMAS

The issue is whether appellant has met his burden of proof in establishing that he contracted asbestosis in the performance of duty on or before August 8, 1990.

This case is on appeal for the second time.¹ On the first appeal, the Board reviewed a December 1, 1993 decision in which the Office of Workers' Compensation Programs' hearing representative affirmed the Office's March 12, 1993 decision. The hearing representative found that the report of Dr. Ewing T. Cook, an impartial medical specialist and a Board-certified internist, dated February 24, 1993, the accompanying pulmonary function test and laboratory reports did not establish a fact of injury. The Board noted that Dr. Cook's opinion was defective because Dr. Cook in reporting appellant's pulmonary function studies did not discuss that appellant's forced vital capacity, forced expiratory volume and diffusing capacity were significantly less than predicted and that the pulmonary function studies when evaluated under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988), showed a Class 2 or Class 3 impairment. The Board further noted that Dr. Cook acknowledged pleural thickening on the x-rays but did not discuss whether the pulmonary function studies showed evidence of only obstructive lung disease without any evidence of restrictive disease or how he was able to discern that none of appellant's impairment was attributable to his established asbestos exposure in the performance of duty. The Board found that Dr. Cook's opinion was not rationalized, did not represent the weight of the medical evidence in the case, and that a conflict in medical opinions existed between Dr. Richard T. Furr, a Board-certified internist with a specialty in pulmonary disease, and Dr. John B. Bass, a Board-certified internist and pulmonologist. The Board remanded the case to the Office for referral of appellant, and a statement of accepted facts together with the case record to a different impartial

¹ Docket No. 94-731 (issued April 19, 1996). The facts and history surrounding the prior appeal is set forth in the initial two decisions and are hereby incorporated by reference.

medical specialist to resolve the conflict in medical evidence under section 8123(a) of the Federal Employees' Compensation Act.

On remand the Office referred appellant to an impartial medical specialist, Dr. Gardner L. Fletcher, a Board-certified internist. In a report dated September 9, 1996, Dr. Fletcher noted that he reviewed appellant's history of injury, performed a physical examination and reviewed diagnostic tests. Dr. Fletcher reported that the x-rays showed pleural thickening laterally beginning at the level of the pacemaker, overlying the fourth posterior rib and extending the length of the lateral chest wall on the left. He reported that the right pleura appeared free of any pleural thickening but the right lower lung field had multiple small nodular densities from one to two millimeters in size. Dr. Fletcher reported that the computerized axial tomography (CAT) scan revealed some mild pleural thickening predominantly on the left, with multiple small pulmonary calcifications and an area of wedge shaped pleural thickening on the right posteriorly which began at the diaphragm and extended [illegible] four centimeters. He also reviewed the pulmonary function studies. Dr. Fletcher diagnosed asbestosis, obstructive lung disease with a significant reversible component, hypertension and cardiac dysrhythmia, status post permanent pacemaker implantation. Dr. Fletcher noted that the diagnosis of asbestosis was based on a strong history of exposure both while working as a machinist mate in the Navy and as a carpenter for the Seabees [*i.e.*, CBC in Gulfport, Mississippi]. He opined that according to the A.M.A., *Guides*, appellant had a Class III to Class IV dyspnea.

In a report dated October 21, 1996, the district medical adviser reviewed Dr. Fletcher's September 9, 1996 report and stated that Dr. Fletcher based his diagnosis of asbestosis mainly on the pleural thickening of the left lung shown on the x-ray. The district medical adviser stated that while pleural thickening is a "hallmark" of prior asbestos lung contamination, it is usually bilateral. He stated that in 1957 appellant had a lung biopsy on the left to rule out tuberculosis, and his pleural thickening on the left was most likely the result of the pleural inflammatory disease on the left lung in 1957. The district medical adviser stated that there were no objective findings to indicate that appellant's present pulmonary disability resulted from asbestos exposure.

By letter dated October 22, 1996, the Office requested Dr. Fletcher to clarify the rationale in his opinion that appellant's lung disease was work related.

By decision dated January 13, 1997, the Office denied appellant's claim, stating that Dr. Fletcher did not relate his diagnosis of asbestosis to appellant's work as a federal civilian. The Office noted that Dr. Fletcher had informed them that he had been unable to respond to their letter because he was busy handling critically ill patients. The Office concluded that the evidence of record did not establish that appellant sustained the condition of asbestosis while employed as a civilian federal employee.

The Board finds that this case is not in posture for decision.

In situations where there are 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 on a proper

factual background, must be given special weight.² In the present case, in the Board's April 19, 1996 decision, the Board found that the February 24, 1993 opinion of the impartial medical specialist, Dr. Cook, was not rationalized and did not represent the weight of the medical evidence, and therefore remanded the case for the Office to refer appellant to another impartial medical specialist to resolve the conflict between Dr. Furr and Dr. Bass as to whether appellant had work-related asbestosis. On remand the Office referred appellant to a new impartial medical specialist, Dr. Fletcher, who, in his September 9, 1996 report, found pleural thickening and multiple small nodular densities from one to two millimeters in size in the right lower lung field based on x-ray and the CAT scan. He diagnosed asbestosis based on appellant's strong history of exposure while working as a machinist mate for the employing establishment and CBC.

Dr. Fletcher's September 9, 1996 opinion is supportive that appellant had work-related asbestosis. Dr. Fletcher stated that appellant had asbestosis based on the x-ray and CAT scan showing pleural thickening and multiple small nodular densities and that appellant had a strong history of asbestos exposure at the employing establishment and CBC. His opinion is not sufficiently rationalized, however, as he does not specifically state how appellant's exposure to asbestos caused his asbestosis and on what evidence he based his opinion. The Board has held that in a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict of medical opinion and this specialist's opinion requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.³ If the impartial medical specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial medical specialist for the purpose of obtaining his rationalized medical opinion on the issue.⁴ In the present case, because Dr. Fletcher's September 9, 1996 opinion is not sufficiently rationalized to establish the requisite causation between appellant's asbestosis and his federal employment, and Dr. Fletcher was unable to submit a supplemental report to clarify or elaborate upon his opinion, the case must be remanded for another impartial medical specialist to render an opinion on whether appellant has work-related asbestosis.⁵ On remand the Office should refer appellant with a statement of the accepted facts and the case record to another impartial medical specialist to resolve the conflict in the evidence.

² *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

³ *Elmer K. Kroggel*, 47 ECAB 557, 558 (1996); *April Ann Erickson*, 28 ECAB 336, 341-42 (1997).

⁴ *Talmadge Miller*, 47 ECAB 673, 682 n. 21 (1996).

⁵ *See Terrance R. Stath*, 45 ECAB 412, 420 (1994).

The decision of the Office of Workers' Compensation Programs dated January 13, 1997 is hereby vacated, and the case remanded for further consideration in a manner consistent with this opinion.

Dated, Washington, D.C.
June 24, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member