

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLEVELAND BROWN and DEPARTMENT OF THE NAVY,
CHARLESTON NAVAL SHIPYARD, Charleston, SC

*Docket No. 98-316; Submitted on the Record;
Issued October 8, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that his asbestosis condition was sustained while in the performance of duty.

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to meet his burden of proof to establish that his asbestosis condition was sustained while in the performance of duty.

On June 6, 1996 appellant, then an 85-year-old retired painter, filed a claim for an occupational disease claim (Form CA-2) alleging that his asbestosis condition was caused by factors of his federal employment. Specifically, he alleged that his condition was caused by the installation of ceiling material in destroyers. Appellant further alleged that he had to cut sheets of material to install in ceilings that he believed to contain asbestos. He also indicated that he was loaned to the joiner shop "off and on" during his employment. The reverse of the form indicated that appellant was last exposed to conditions that allegedly caused his condition on August 18, 1964.¹ Appellant's claim was accompanied by factual and medical records from the employing establishment.

By letter dated September 9, 1996, the Office of Workers' Compensation Programs advised appellant to submit factual evidence regarding his exposure to asbestos while working for the employing establishment. In response, appellant, through his daughter, Yvonne B. Capers, submitted factual and medical evidence by letter dated October 31, 1996.

By decision dated January 21, 1997, the Office found the evidence of record insufficient to establish that appellant sustained an injury while in the performance of duty. In an accompanying memorandum, the Office found that while the evidence of record established that

¹ The record indicates appellant worked at the employing establishment commencing October 21, 1941 and retired on disability from the employing establishment on August 26, 1964.

appellant sustained a pulmonary condition that might be asbestosis, there was no evidence of record establishing that appellant was exposed to asbestos while working for the employing establishment.

In undated letters received by the Office on April 15 and May 15, 1997, appellant requested reconsideration of the Office's decision accompanied by medical evidence. By decision dated May 22, 1997, the Office denied appellant's request for modification based on a merit review of the claim.

In an August 18, 1997 letter, appellant requested reconsideration of the Office's decisions accompanied by factual evidence. By decision dated November 20, 1997, the Office denied appellant's request for reconsideration without a merit review of the claim on the grounds that the evidence submitted was of a repetitious nature.

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; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that 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.² The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant,³ must be one of reasonable medical certainty,⁴ 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.⁵

In this case, appellant has failed to submit sufficient factual evidence to establish that he was exposed to asbestos while working for the employing establishment. The employing establishment denied that appellant was exposed to asbestos while performing his duties as a painter. In a June 6, 1996 memorandum to the file, D.M. Wilson, an Office representative, during a conversation with appellant and Ms. Capers indicated that appellant's memory was vague concerning the places he worked at the employing establishment and how often or how long he was assigned to the Joiner Shop. Mr. Wilson further indicated that appellant stated that

² See *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

³ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁴ See *Morris Scanlon*, 11 ECAB 384-85 (1960).

⁵ See *James D. Carter*, 43 ECAB 113 (1991); *George A. Ross*, 43 ECAB 346 (1991); *William E. Enright*, 31 ECAB 426, 430 (1980).

while he worked in the Joiner Shop, he installed asbestos ceiling tiles on destroyers, but that appellant was unable to tell him how he knew the material was asbestos. He also noted appellant's nonfederal employment in concrete plants prior to working at the employing establishment and suggested that appellant could have been exposed to asbestos from building products, but that appellant disagreed. Mr. Wilson noted that he and appellant agreed that the tiles were suspect, but that they had not been identified as containing asbestos. Further, although appellant submitted factual evidence in response to the Office's September 9, 1996 letter, this evidence did not contain any narrative statements supportive of his allegation that he was exposed to asbestos while working at the employing establishment. Therefore, appellant has failed to establish that he was exposed to asbestos while he worked at the employing establishment.

In addition, although appellant submitted medical evidence indicating that he may have asbestosis, he failed to submit any rationalized medical evidence establishing that his asbestosis condition was caused by factors of his employment. In a May 20, 1996 computerized tomography report, Dr. Daniel Ravenel, a Board-certified radiologist, indicated extensive calcified pleural plaques, more on the right than on the left. Dr. Ravenel further indicated that these could be due to asbestos exposure. He stated that distribution on the left was somewhat atypical and that there were nonspecific fibrotic changes in both lower lung fields. Dr. Ravenel further stated that small bullae also are present in both lungs. His medical report failed to address whether appellant was exposed to asbestos while working for the employing establishment or relate his findings to appellant's federal employment.

In a May 28, 1996 attending physician's report (Form CA-20), Dr. Thomas E. O'Mara, a Board-certified internist, indicated that appellant had asbestosis, but failed to indicate whether appellant's condition was caused by factors of his employment or to explain how or why appellant's condition was caused by factors of his employment. Thus, it is insufficient to establish appellant's burden.

Appellant submitted a February 14, 1997 medical report, of Dr. Cary E. Fechter, a Board-certified internist, revealing a history of appellant's exposure to asbestos while working at the employing establishment, medical treatment, and his findings on physical and objective examination. Dr. Fechter concluded that based on the significantly abnormal chest x-ray showing predominantly pleural disease, a FVC less than 80 percent of predicted and previous heavy asbestos exposure, appellant had findings diagnostic of asbestosis. He, however, failed to explain how or why appellant's asbestosis condition was caused by factors of his federal employment.

Inasmuch as appellant has failed to submit the evidence as requested by the Office establishing that his asbestosis condition was caused by factors of his federal employment, the Board finds that appellant has failed to satisfy his burden.⁶

The November 20, May 22 and January 21, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
October 8, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ The Office properly denied appellant's July 7, 1997 request for reconsideration as appellant failed to submit any new or relevant evidence pertaining to his claim of asbestos exposure. *See* 20 C.F.R. § 10.138.