

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FLOYD J. BATTLES and DEPARTMENT OF THE ARMY,
ANNISTON ARMY DEPOT, Anniston, AL

*Docket No. 97-1834; Submitted on the Record;
Issued September 28, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has met his burden of proof to establish that his claimed disability commencing on August 4, 1987 was causally related to factors of his employment.

On November 24, 1992 appellant, then a 52-year-old boiler plant mechanic, filed an occupational disease claim alleging that he sustained a pulmonary condition which he attributed to exposure to asbestos at work. He retired from the employing establishment on August 4, 1987.

The Office of Workers' Compensation Programs subsequently accepted that appellant sustained a pleural plaque condition due to factors of his federal employment. The record shows that appellant has a concurrent nonwork-related condition of chronic bronchitis due to tobacco use.¹

In a memorandum dated August 7, 1987, Dr. Robert B. Andrews, Jr., an osteopath and an employing establishment physician, stated that appellant was at increased risk of health impairment from exposure to asbestos and other substances and that if, in the future, he needed to use respiratory protective equipment, it was recommended that he use a positive pressure type respirator only.

In a notification of personal action dated August 11, 1987 regarding appellant's disability retirement, the employing establishment noted that appellant retired because he was unable to lift more than 35 pounds or wear a gas mask.

¹ In an April 20, 1994 Office decision, appellant was granted a schedule award based on a 20 percent permanent impairment of the lungs.

By decision dated April 23, 1993, the Office denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to establish that he sustained an injury as a result of his exposure to asbestos at work.

By letter dated May 7, 1993, appellant requested an oral hearing before an Office hearing representative.

By decision dated October 4, 1993, the Office hearing representative remanded the case, directing the Office to refer appellant to a Board-certified pulmonary specialist in order to determine whether appellant had any asbestos-related disease causally related to his occupational exposure to asbestos.

In a report dated February 25, 1994, Dr. Ben V. Branscomb, a Board-certified specialist in pulmonary disease of professorial rank and an Office second opinion referral physician, related that he had carried out a complete medical and pulmonary evaluation of appellant and had reviewed his medical records. Dr. Branscomb stated that he had also obtained an electrocardiogram, complete pulmonary function studies, arterial blood examinations at rest and a chest x-ray. He noted that appellant had been exposed to asbestosis between 1974 and 1987 and that he wore a cloth dust mask initially and then began using a respirator in 1983.² Dr. Branscomb also noted that appellant had asbestos exposure while serving in the army and from 1958 to 1972 in private industry. He stated that appellant smoked one and one fourth packs of cigarettes daily. Dr. Branscomb provided a summary of the medical records, an employment history, a family history, an individual health history and provided detailed findings on examination and the results of diagnostics tests and stated:

“[Appellant] has tobacco-induced chronic bronchitis with preservation of good lung function. He has an area a pleural thickening on the right chest wall which is compatible with and in my opinion represents an asbestos-induced plaque. [Appellant] also has minimal interstitial changes which could represent asbestosis but look more like post-inflammatory changes.”

In a supplemental report dated March 29, 1994, Dr. Branscomb stated that appellant had a pulmonary condition, a pleural plaque, which, in his opinion, arose out of exposure to asbestosis while working at the employing establishment. He stated:

“Strictly speaking this is not pulmonary but rather lies [in] the chest wall adjacent to the lung. His pleural plaque is not a disease, in the sense that it does not disrupt or alter his function, does not cause symptoms and carries no adverse prognosis. It is, however, a marker indicating that he has inhaled asbestos. I believe this condition, the plaque, as caused by asbestosis because it has the configuration commonly seen with that condition. I found no other or likely cause. It is, however, quite nonspecific and other causes are possible.”

² An Office statement of accepted facts states that appellant wore cloth dust masks during the first few years of his employment but began wearing a respirator in 1983.

By letter dated May 4, 1994, appellant requested an oral hearing before an Office hearing representative and submitted additional evidence.

In a statement dated November 25, 1986, appellant's supervisor related that appellant could not perform his job as he was required to wear a gas mask and at times a respirator and to lift up to 50 pounds. He related that other employees had assisted appellant when he had to lift any material but, "as for the wearing of the gas mask [the employing establishment could not] accommodate appellant.

In a report dated November 4, 1994, Dr. Brian G. Forrester, a family practitioner, related that appellant had worked for 13 years from 1973 to 1986 and had been exposed to asbestos as a routine part of his job duties and was not provided with any respiratory protective equipment. He stated that a chest x-ray revealed small irregular opacities in the lower two lungs zones consistent with interstitial fibrosis. Dr. Forrester stated that there were pleural plaques noted in the convexities of both lungs. He stated:

"In summary, because of [appellant's] occupational exposure history and chest x-ray abnormalities, I have diagnosed him as having asbestos and asbestosis-related pleural disease. I have informed him of these diagnoses and of the need for yearly medical surveillance examinations due to the likelihood of progression of his disease and the increased risk for the development of lung cancer and mesothelioma."

On July 30, 1996 appellant filed a claim alleging wage loss commencing on August 4, 1987.

In a report dated August 15, 1996, Dr. William J. Ferguson, Jr., a Board-certified internist specializing in pulmonary disease and an Office referral physician, provided a history of appellant's condition and exposure to asbestos, detailed findings on examination and the results of pulmonary function studies and stated his impression of a history of asbestos exposure. Dr. Ferguson stated that the only asbestos-related finding in appellant was that of pleural thickening along the right chest wall which was mild and would not be expected to impair pulmonary function or cause symptoms. He stated that this was a very common finding in patients who had been exposed to asbestos and had no long-term implications. Dr. Ferguson also diagnosed chronic obstructive pulmonary disease with continued cigarette abuse. He stated:

"I do not find any evidence of impairment or limitation of exertional capacity related to asbestos exposure. The only asbestosis related finding is that of mild pleural thickening along his right lateral chest wall on his chest x-ray from which I would expect him to be asymptomatic. I do not believe that any of his impairment is work related."

By decision dated October 16, 1996, the Office denied appellant's claim for compensation benefits commencing on August 4, 1987 based on the grounds that the evidence of record failed to demonstrate that appellant's claimed disability commencing on August 4, 1987 was causally related to his employment injury.

By letter dated November 6, 1996, appellant requested a review of the written record. He submitted no new evidence but argued that he was forced to retire because of his inability to wear a gas mask and respirator.

By decision dated March 14, 1997, the Office hearing representative affirmed the Office's October 16, 1996 decision on the grounds that the evidence of record failed to establish that appellant was disabled on and after August 4, 1987 due to his exposure to asbestos during the course of his federal employment.

The Board finds that appellant has failed to meet his burden of proof to establish that his claimed disability commencing on August 4, 1987 was causally related to factors of his employment.

An employee seeking benefits under the Federal Employees' Compensation Act³ 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 timely filed within the applicable time limitation period of the Act, that an injury was sustained 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.⁴

An award of compensation may not be predicated on surmise, conjecture, speculation or upon a claimant's belief of causal relationship. A claimant has the burden of establishing by reliable, probative and substantial evidence that the disability was causally related to a specific employment incident or to specified conditions of employment and, as part of such burden of proof, rationalized medical evidence must be submitted.⁵ 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 and accurate factual and medical background of the claimant, must be one of reasonable medical certainty 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.⁶

In this case, appellant sustained a pleural plaque condition as a result of exposure to asbestos at the employing establishment. The record shows that he retired on August 4, 1987. On July 30, 1996 he filed a claim alleging that he was disabled commencing on August 4, 1987 due to his employment injury.

In a report dated February 25, 1994, Dr. Branscomb, related that he had carried out a complete medical and pulmonary evaluation of appellant and had reviewed appellant's medical

³ 5 U.S.C. §§ 8101-8193.

⁴ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁶ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

records. He stated that he had also obtained an electrocardiogram, complete pulmonary function studies, arterial blood examinations at rest and a chest x-ray. Dr. Branscomb noted that appellant had been exposed to asbestosis between 1974 and 1987 and that he wore cloth dust mask initially and then began using a respirator in 1983. He stated that appellant smoked one and one fourth packs of cigarettes daily. Dr. Branscomb provided a summary of the medical records, an employment history, a family history, an individual health history and provided detailed findings on examination and the results of diagnostics tests and stated that appellant had tobacco-induced chronic bronchitis with preservation of good lung function and an area a pleural thickening on the right chest wall which represented an asbestos-induced plaque. In a supplemental report dated March 29, 1994, he stated his opinion that appellant's pleural plaque condition arose out of his exposure to asbestosis while working at the employing establishment. Dr. Branscomb indicated that the condition was a marker indicating that he had been exposed to asbestos but was not a disease in that it did not disrupt or alter functions and did not cause symptoms. As he did not opine that appellant had any disability causally related to his employment injury, his reports do not support appellant's contention that his claimed disability commencing on August 4, 1987 was causally related to factors of his employment.

In a report dated August 15, 1996, Dr. Ferguson, provided a history of appellant's condition and exposure to asbestosis, detailed findings on examination and the results of pulmonary function studies and stated his impression of a history of asbestos exposure. He stated that the only asbestos-related finding in appellant was that of pleural thickening along the right chest wall which was mild and would not be expected to impair pulmonary function or cause symptoms. Dr. Ferguson stated that this was a very common finding in patients who had been exposed to asbestos and had no long-term implications. He also diagnosed chronic obstructive pulmonary disease with continued cigarette abuse. Dr. Ferguson stated that he found no evidence of impairment or limitation of exertional capacity related to asbestos exposure and that his claimed disability was not work related. As he stated his opinion that appellant had no impairment or limitation related to his employment, this report does not discharge appellant's burden of proof.

In a report dated November 4, 1994, Dr. Forrester, stated his opinion that appellant had a pleural condition and asbestosis condition related to his asbestos exposure at work but he did not indicate that appellant was disabled commencing in 1987 due to these conditions and therefore this report does not establish that appellant's claimed disability commencing on August 4, 1987 was causally related to his employment.

Appellant argued that he was forced to retire because of his inability to wear a gas mask and respirator and therefore he is due lost wages commencing on his retirement date of August 4, 1987. However, although there are employing establishment documents which state that appellant was not able to wear a gas mask or respirator, none of the physicians who examined appellant, between 1987 and 1996, stated that he was unable to use a gas mask or respirator, including Drs. Branscomb and Ferguson who examined appellant.

In a memorandum dated August 7, 1987, Dr. Andrews stated that, if appellant needed to use respiratory protective equipment, it was recommended that he use a positive pressure type respirator only. However, he did not indicate that appellant was not able to wear a gas mask or

respirator. Dr. Andrew only recommended a particular type of respirator. Therefore, this report does not establish that appellant's retirement on August 4, 1987 was caused by his employment injury of pleural plaque due to asbestos exposure.

The March 14, 1997 and October 16, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
September 28, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member