

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD O. CUNDIFF and TENNESSEE VALLEY AUTHORITY,
New Johnsonville, TN

*Docket No. 99-2370; Submitted on the Record;
Issued October 16, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issue is whether appellant met his burden of proof in establishing that he sustained a recurrence of disability beginning January 1, 1997 causally related to his December 18, 1987 employment injury.

In this case, the Office of Workers' Compensation Programs accepted that appellant, an asbestos worker and insulator, developed pleural thickening as a result of his 27 years of federal employment.¹ Appellant was last exposed to the conditions which caused his disease in 1987, when he resigned his position with the employing establishment.

In January 1988, appellant was elected as business manager of the Asbestos Workers Local Union 86 and performed administrative duties for approximately nine years until he lost an election for another term in January 1997.

On January 15, 1997 appellant filed a notice of recurrence of disability indicating that his lung condition caused him additional disability. On April 10, 1997 the Office advised appellant to submit medical evidence establishing disability from work during the entire claimed period and an explanation of why appellant voluntarily left employment with the union. Appellant responded to the Office's April 10, 1997 inquiry and explained that he did not voluntarily leave his position as business manager, but that he lost an election for another term. He indicated that he had intended on being reelected and working one more year until he turned 62 and then he planned to retire.

Appellant subsequently submitted a work capacity evaluation form dated May 9, 1997 from Dr. Clyde Heflin, a Board-certified physician in pulmonary disease, who indicated that appellant was able to work with some restrictions. He reported that, due to restrictive lung

¹ Medical evidence established that appellant had developed asbestos-related pleural disease. On April 17, 1997 the Office awarded appellant a schedule award.

disease from asbestosis and recent thoracic surgery, appellant's capacity to engage in activities involving strenuous physical exertion was limited and his condition had precluded him from exposure to temperature extremes, airborne particles, fumes or fibrosing agents such as asbestos.

On June 26, 1997 appellant filed a claim for continuing compensation on account of his accepted condition, however, he did not specify a period of disability. On July 14, 1997 the Office requested medical evidence regarding appellant's lung disease from 1987 to the present. In response, appellant submitted a second work capacity evaluation from Dr. Heflin dated August 19, 1997 and medical evidence from various physicians who diagnosed his lung disease and evaluated his condition relative to asbestos exposure. Dr. Heflin's August 19, 1997 work capacity evaluation reiterated that appellant was precluded from strenuous physical activity and exposure to extreme temperature changes, airborne particles and fumes due to mild thoracic radiculopathy and previous surgery, but that appellant could perform work within restrictions. The medical reports submitted established that appellant underwent a right thoracostomy in 1995, which he tolerated well; that he had been treated for persistent chest pain and shortness of breath in October 1996; and that he was regularly evaluated by x-ray and computerized tomography scan for asbestos-related changes in the chest, abdominal and pelvic areas.

By decision dated October 24, 1997, the Office disallowed appellant's request for compensation for lost wages as the evidence did not support disability from work.

In a letter dated November 3, 1997, appellant disagreed with the October 24, 1997 decision and requested an oral hearing before a hearing representative.

A hearing was held on June 17, 1998 at which appellant was represented by counsel. Appellant testified about the medical restrictions outlined for him by Dr. Heflin and noted that he had difficulty breathing and participating in some physical activities. Appellant testified that he had resigned from the employing establishment to run for a business manager position with the local union, which he held for nine years, and that he filed a claim for recurrence of total disability when he was not reelected to the position in 1997.

Appellant's counsel, Sherman Ames, III, Esq., argued at the hearing that, if appellant had not had a breathing impairment, he would have been able to go back to work for the employing establishment for a couple of years before retirement, after he lost the election with the Union. He stated that appellant filed the claim for compensation because he could not go back to work for the employing establishment.

Appellant later submitted additional evidence requested at the oral hearing, which included wage statements and a June 24, 1998 medical note from Dr. Heflin. He reported that appellant had asbestos-related pleural disease including significant pleural thickening and recurrent pleural effusions, which resulted in right thoracotomy, removal of a pleural peel and located effusion in 1995. Dr. Heflin also reported that appellant had severe obstructive lung disease with a measured FEV¹ of 55 and a moderate restrictive defect. Dr. Heflin opined that appellant was completely disabled and could not perform exertional duties.

By decision dated October 1, 1998, the Office hearing representative affirmed the October 24, 1997 decision denying the recurrence of total disability beginning January 1, 1997.

The hearing representative found that appellant's claim was not supported by an explanation or reasoned medical opinion based on a complete and accurate factual and medical background showing how appellant's total disability beginning January 1, 1997 causally related to the approved injury of December 18, 1987.

In a letter dated November 4, 1998, appellant requested reconsideration of the prior decision and submitted an October 28, 1998 medical note from Dr. Heflin who noted the condition of appellant's lung disease and that his disability at that time was directly related to his underlying lung condition, which resulted from his previous employment.

By decision dated February 8, 1999, the Office denied modification of the prior decision based on a merit review. The Office found that the evidence submitted in support of the application for review was insufficient because it did not list specific employment factors, which may have contributed to the disability beginning January 1, 1997, and did not contain a reasoned medical opinion on causal relationship between appellant's disability beginning January 1, 1997 and the December 18, 1987 employment injury. The Office, therefore, found that the evidence was insufficient to warrant modification of the prior decision.

The Board finds that appellant has failed to meet his burden of proof in establishing that he sustained a recurrence of disability beginning January 1, 1997 causally related to his December 18, 1987 employment injury.

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his recurrence of disability and his original employment injury.² This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is casually related to employment factors and supports that conclusion with sound medical reasoning.³ The term "disability" has been defined the Federal Employees' Compensation Act as "the incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury. It may be partial or total."⁴

In this case, appellant has failed to submit rationalized medical evidence establishing that he was totally disabled beginning January 1, 1997 due to his December 18, 1987 employment injury. Appellant alleged that his disability began January 1, 1997 when he lost a union election. He reported that he anticipated working in the union position for an additional year until retirement and that when he lost the election, he filed a claim alleging that his 1987 employment injury caused him disability. His attorney argued at the hearing that, if not for his breathing impairment, he would have been able to return to work at the employing establishment.

The issue in this case is medical in nature. Appellant must establish that he was totally disabled as of January 1, 1997 due to his accepted medical condition. The only medical

² *Dominic M. DeScala*, 37 ECAB 795 (1986).

³ *Nicolea Brusco*, 33 ECAB 1138 (1982).

⁴ 20 C.F.R. § 10.5(f).

evidence of record that addressed the issue of disability were two medical reports from Dr. Heflin that appellant could not perform exertional duties and that simply outlined appellant's previously evaluated restrictions when he worked for the employing establishment. Neither report explained why appellant became medically disabled as of January 1, 1997, when he had been able to work since his 1987 employment injury. In his October 28, 1998 medical note, Dr. Heflin diagnosed appellant's lung condition and stated that appellant's disability at that time was directly related to his underlying problems, which resulted from his previous employment. Dr. Heflin's conclusory opinion regarding causal relationship but still did not explain, with medical rationale, why appellant was disabled for all work. Thus this report is of diminished probative value.

The record indicates that appellant's work duties were restricted while at the employing establishment due to his lung condition. However, there is no evidence that he resigned from this position because he was incapable of performing his assigned duties due to the December 18, 1987 employment injury. Moreover, there is no evidence of record that appellant was medically incapable of performing his assigned duties as a business manager with the union at any time during his tenure, or incapable of work after he left employment on January 1, 1997, due to the December 18, 1987 employment injury.

The decisions of the Office of Workers' Compensation Programs dated February 8, 1999 and October 1, 1998 are hereby affirmed.

Dated, Washington, DC
October 16, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member