

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL J. PAGLIA and DEPARTMENT OF THE AIR FORCE,
AIR NATIONAL GUARD, Baltimore, MD

*Docket No. 01-972; Submitted on the Record;
Issued December 14, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden to establish that he sustained an emphysema condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for further review on the merits under 5 U.S.C. § 8128(a).

On August 11, 1998 appellant, a 70-year-old aircraft maintenance technician, filed a Form CA-2 claim for benefits based on occupational disease, alleging that he had sustained an emphysema condition which was causally related to factors of his employment. He alleged that this condition was caused by work-related exposure to asbestos.

In a report dated August 10, 1998, Dr. Surinderpal S. Sodhi, Board-certified in internal medicine, stated that appellant had a history of exposure to asbestos and gas fumes, and noted that pulmonary function tests indicated that he had severe obstructive air wave disease with decreased diffusion and emphysema. Dr. Sodhi advised that he was unable to determine the extent to which the fumes appellant inhaled during his job as an aircraft technician contributed to his severe obstructive airways disease.

On April 27, 1999 in order to determine whether appellant's emphysema condition was causally related to factors of his federal employment, the Office referred appellant to Dr. Stuart Jacobs, Board-certified in internal medicine. In a report dated May 3, 1999, Dr. Jacobs reviewed appellant's medical history and the statement of accepted facts, stated findings on examination and concluded:

“[Appellant] has had progressive shortness of breath dyspnea on exertion dating back to the early 1970's. He began requiring treatment for obstructive lung disease in 1991 when he was diagnosed with ... emphysema. He had a 40-pack-year history of smoking and quit at that time. His emphysema has more recently been complicated by bilateral upper lobe pneumonia, one of which required thoractomy because of suspicion of cancer, which was negative.

“[Appellant] has a history of exposure to asbestos during the 11 years that he worked for the Maryland National Guard. He states in his written narrative his belief that his exposure to asbestos “no doubt is the cause of my emphysema.” [Appellant’s] asbestos exposure was intermittent and mild by usual industrial standards. There is nothing in his medical exam[ination] or test that reveals any sign of asbestosis. Specifically [computerized axial tomography] CAT scan and chest x-rays have not shown interstitial fibrosis or pleural plaques. He has no restrictive lung disease typical of asbestosis. Recent partial resection of the left lung showed scarring from pneumonia, emphysema and no evidence of interstitial fibrosis (asbestosis).

“I therefore find that [appellant] has severe chronic obstructive lung disease in a pattern consistent with emphysema. There is no evidence of asbestosis, asbestosis-related pleural plaques, carcinoma of the lung or mesothelioma. [Appellant’s] belief that asbestos exposure caused his emphysema is medically incorrect as asbestos does not cause emphysema. His cigarette smoking is the proximate cause of his emphysema. The question has also been raised as to exposure to other substances such as paint and fumes from thinners. I am not able to comment specifically without details from materials safety data sheets on the products in question. In general, exposure to those types of fumes is not expected to cause emphysema.”

By decision dated June 11, 1999, the Office denied appellant’s claim on the grounds that he did not submit medical evidence sufficient to establish that the claimed medical condition was causally related to his federal employment.

By letter dated July 6, 1999, appellant requested a hearing, which was held on January 24, 2000.

By decision dated April 10, 2000, an Office hearing representative affirmed the June 11, 1999 Office decision.

By letter dated July 5, 2000, appellant requested reconsideration. In support of his request, he submitted May 16, 2000 surgery note from Dr. Robert Sawyer, a Board-certified otolaryngologist, who stated that he performed biopsies on appellant’s larynx which showed mild dysplasia and stated that appellant did not smoke and had a past history of asbestos exposure.

By decision dated October 27, 2000, the Office denied appellant’s application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emphysema condition in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing that 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.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

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. The medical evidence required to establish causal relationship is usually rationalized medical 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, 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.⁴

In the present case, appellant failed to submit medical evidence demonstrating a causal relationship between his emphysema condition and factors of his employment. The medical evidence consists of reports from Drs. Sodhi and Jacobs, neither of which indicated that appellant's exposure to asbestos and fumes resulted in his emphysema condition. Dr. Sodhi noted appellant's history of exposure to asbestos and gas fumes and diagnosed severe obstructive airway disease with decreased diffusion and emphysema, but was unable to determine the extent to which this exposure contributed to his severe obstructive airways disease. Dr. Jacobs advised that appellant's asbestos exposure was intermittent and mild by industry standards, and noted that none of the diagnostic tests appellant underwent revealed any sign of asbestosis, interstitial fibrosis, pleural plaques or restrictive lung disease typical of asbestosis. He opined that appellant has severe chronic obstructive lung disease consistent with emphysema, which was proximately caused by cigarette smoking; he emphasized that asbestos exposure does not cause emphysema. Dr. Jacobs further stated that he was unable to render a definitive opinion regarding

¹ 5 U.S.C. §§ 8101-8193.

² *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁴ *Id.*

emphysema and appellant's exposure to other substances such as paint and fumes from thinners, although he opined that, in general, exposure to those types of fumes was not expected to cause emphysema. Appellant, therefore, has failed to submit any rationalized, probative medical evidence establishing that the diagnosed condition of emphysema is causally related to employment factors or conditions.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.⁵ Causal relationship must be established by rationalized medical opinion evidence. The Office advised appellant of the type of evidence required to establish his claim; however, appellant failed to submit such evidence. Appellant, therefore, did not provide a medical opinion to sufficiently describe or explain the medical process through which factors of his employment would have been competent to cause his claimed condition. Thus, the Office's April 10, 2000 decision is affirmed.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.607, a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office or by submitting relevant and pertinent evidence not previously considered by the Office.⁶ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁷

In this case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. The evidence appellant submitted was either previously considered and rejected by the Office in prior decisions, or is not pertinent to the issue on appeal. Additionally, appellant's letter failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Therefore, the Office acted within its discretion in refusing to reopen appellant's claim for a review on the merits. The Board therefore affirms the Office's October 27, 2000 decision.

⁵ *See Id.*

⁶ 20 C.F.R. § 10.607(b)(1). *See generally* 5 U.S.C. § 8128(a).

⁷ *Howard A. Williams*, 45 ECAB 853 (1994).

The decisions of the Office of Workers' Compensation Programs dated October 27 and April 10, 2000 are hereby affirmed.

Dated, Washington, DC
December 14, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member