

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA J. DEVANEY, claiming as widow of TERRENCE J. DEVANEY
and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,
BOSTON AIR ROUTE TRAFFIC CONTROL CENTER, Nausha, NH

*Docket No. 00-1197; Submitted on the Record;
Issued March 16, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the employee's death due to cancer was causally related to exposure to asbestos at work.

On December 12, 1997 appellant, the employee's widow, filed a claim for death benefits. She indicated that the employee died on November 11, 1997 and related his death to exposure to asbestos exposure at work. In an accompanying report, Dr. William C. Stephan, a Board-certified pulmonologist, stated that the employee was treated for adenocarcinoma of the lung and pulmonary fibrosis. He indicated that the direct cause of death was metastatic adeno cancer of the lung. Dr. Stephan reported that pulmonary fibrosis presumed to be asbestosis contributed to the employee's death. He commented that the employee's adenocarcinoma was associated both with his history of smoking and asbestos exposure. Dr. Stephan noted that asbestos exposure had a dramatic impact on the risk of lung cancer as well as interstitial lung disease. Appellant submitted extensive reports that described the presence of asbestos in the employing establishment, which had been used as insulation in the construction of the building.

The Office of Workers' Compensation Programs requested information from the employing establishment on the presence of asbestos at the employee's workplace. The employing establishment responded that area sampling results from the employing establishment during the period of the employee's employment showed that asbestos levels were well below the levels set by the Office of Safety and Health Administration.

The Office referred the case record and a statement of accepted facts to Dr. David Kanarek, a Board-certified pulmonologist, for his review and his opinion on whether the employee's death was related to exposure to asbestos at work. In an August 3, 1998 report, he noted that the employee had a history of smoking until 1972. Dr. Kanarek commented that the diagnosis of asbestosis apparently was based on a report of interstitial lung disease on a chest x-ray and a restrictive pattern on pulmonary function tests taken on March 19, 1987. Dr. Kanarek pointed out, however, that the same pulmonary function test showed a normal diffusing capacity.

He indicated that, in 1989, at the time of the diagnosis of cancer, a chest computerized tomography (CT) scan showed the presence of extensive parenchymal destruction from chronic obstructive pulmonary disease. Dr. Kanarek interpreted this finding to show emphysema and not a finding of interstitial fibrosis related to asbestos exposure. He also noted no findings of pleural thickening or pleural plaques which would be expected if there was significant asbestos exposure. Dr. Kanarek commented that it was difficult to determine the extent of asbestos exposure from the records but his interpretation would be that asbestos exposure was very low level and unlikely to be of the degree to cause asbestosis or lung cancer. He concluded, therefore, that the employee's cancer was caused by smoking and not by exposure to asbestos, based on the absence of any clear evidence of asbestosis in the CT scan or diffusing capacity.

In an August 17, 1998 decision, the Office denied appellant's claim for death benefits on the grounds that the evidence of record failed to establish that the employee's death was causally related to factors of his federal employment.

In a September 24, 1998 letter, appellant requested reconsideration. She submitted in support of her request statements from coworkers of the employee who stated that asbestos was exposed in the employing establishment until 1973 when it was placed behind fibrous material on the walls and suspended ceilings. One coworker stated that the janitorial staff during this period attempted to vacuum the exposed asbestos to clean up the appearance of the employing establishment, releasing dust, which covered the employees. The coworker estimated that this activity lasted for approximately one month. Both coworkers indicated that air sampling was not performed during this time period.

Appellant also submitted a September 29, 1998 report from Dr. Stephan who indicated that he first examined the employee in 1987. He noted that the employee had bibasilar rales on physical examination and a chest x-ray showed chronic interstitial lung disease. Dr. Stephan reported that pulmonary function tests showed a pattern of mild restriction with mild reduction in diffusing capacity that corrected for alveolar volume going back to a test from January 1980. He stated that there was no evidence of pulmonary emphysema at that time. Dr. Stephan commented that the employee did not at any time exhibit obstructive lung disease or limitation to airflow that was the physiologic hallmark of pulmonary emphysema. He diagnosed pulmonary fibrosis of unknown cause, likely related to asbestos exposure. Dr. Stephan stated that the adenocarcinoma, diagnosed in 1989, was the cause of the employee's death. He indicated that the interstitial lung disease was mild and did not contribute to the employee's death. Dr. Stephan stated that the employee was exposed to two carcinogens, cigarette smoke and asbestos, which were presumed to be related to the appearance of cancer. He commented that it was difficult to say whether the 1987 x-rays would be helpful. Dr. Stephan indicated that the x-rays pertained principally to the employee's interstitial lung disease which was not related to the cause of the employee's death. He indicated that the relationship between the employee's interstitial lung disease and asbestosis remained one of presumption based on history.

In a November 16, 1999 merit decision, the Office denied appellant's request for modification of the prior decision.

The Board finds that appellant has not met her burden of proof in establishing that the employee's death was causally related to his employment.

An appellant has the burden of proving by the weight of the reliable, probative and substantial evidence that the employee's death was causally related to his or her federal employment. This burden includes the necessity of furnishing medical opinion evidence of a cause and effect relationship based on a proper factual and medical background.¹

Dr. Kanarek examined the medical reports carefully and noted that appellant did not have the findings in diffusing capacity and the CT scan to support a diagnosis of asbestosis. He further noted the absence of pleural plaques and pleural thickening which would accompany a history of asbestos exposure. Dr. Kanarek indicated that the extent of the employee's asbestos exposure was very low and, therefore, unlikely to cause asbestosis or cancer. He concluded that the employee's death was due solely to smoking. Dr. Kanarek's report was detailed and his conclusion was supported by rationale based on a close examination of the medical evidence. Dr. Stephan had a different interpretation of the chest x-ray and pulmonary function tests, concluding that they showed interstitial lung disease. He also stated that the employee had no history or evidence of emphysema. Dr. Stephan indicated, however, that the employee's interstitial lung disease did not contribute to his death. He only indicated that the employee was exposed to two carcinogens, cigarette smoke and asbestos. Dr. Stephan gave no rationale to explain how the employee's cancer was related to his death, particularly when he stated that the employee's interstitial lung disease did not contribute to his death. Dr. Kanarek's report, therefore, has more probative value than Dr. Stephan's report, which contains assertions without explanation of the basis of those assertions. Appellant, therefore, has not submitted sufficient medical evidence to carry her burden of proof in establishing that the employee's death was due to his exposure to asbestos.

The decision of the Office of Workers' Compensation Programs, dated November 16, 1999, is hereby affirmed.

Dated, Washington, DC
March 16, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

¹ Carolyn P. Spiewak (*Paul Spiewak*), 40 ECAB 552 (1989).