U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CALVIN R. BROWN and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 02-395; Submitted on the Record;
Issued December 9, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS

The issues are: (1) whether appellant met his burden to establish that he sustained an asbestosis condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly found that appellant had abandoned his request for a hearing before an Office hearing representative.

Appellant, a 56-year-old machinist, filed a claim for benefits on May 15, 2000, alleging that he developed an asbestosis condition causally related to factors of his employment.

By letter dated May 25, 2000, the Office advised appellant that it required additional factual and medical evidence to determine whether he was eligible for compensation benefits. The Office asked appellant to describe any exposure he may have had to toxic substances. The Office also requested appellant to submit a comprehensive medical report from his treating physician describing his symptoms and the medical reasons for his condition and an opinion as to whether his claimed condition was causally related to his federal employment. The Office requested that appellant submit the additional evidence within 30 days.

Appellant submitted copies of yearly chest x-rays dated January 4, 1989, March 5, 1991, April 8, 1992, May 25, 1993, March 7, 1994, March 7, 1996, March 6, 1997 and March 24, 1998, all of these were negative. Appellant also submitted a March 2, 1995 chest ray, which noted moderate pleural thickening along both lateral chest walls, more marked on the left than on the right and an April 28, 2000 chest x-ray which noted stable pleural thickening, bilaterally.

The Office referred appellant for a second opinion examination by Dr. Rana T. Tan, a specialist in internal medicine. In a report dated December 7, 2000, Dr. Tan stated that appellant had a history of asbestos exposure without convincing clinical evidence for asbestos-related lung disease. She advised that appellant's employment records indicated "none to minimal" and "ambient to light" exposure to asbestos, for approximately zero to one hours per day. Dr. Tan had appellant undergo a series of diagnostic tests, including radiographs, x-rays, spirometry tests, tests for respiratory capacity and an electrocardiogram, none of which indicated that appellant

had a permanent impairment associated with a condition related to asbestos exposure. She concluded that appellant had no objective evidence of pulmonary disease and opined that he was not currently disabled as a result of any pulmonary disease based on industrial exposure.

In a report dated December 12, 2000, Dr. Tai Hipe Luong, P.hd, stated that a magnetic resonance imaging scan had indicated minimal pleural thickening, bilaterally, with no evidence of active pulmonary disease. Dr. Luong did not indicate whether these findings were causally related to factors or conditions of appellant's federal employment.

By decision dated December 21, 2000, 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 January 21, 2001, appellant requested an oral hearing. He did not submit any medical evidence with this request.

By letter dated April 12, 2001, the Office informed appellant that a hearing would be held on July 24, 2001.

In an August 13, 2001 decision, the Office found that appellant abandoned his request for a hearing, as he failed to appear at the time and place set for the hearing and did not show good cause for his failure to appear.

The Board finds that appellant has not met his burden of proof to establish that he sustained an asbestosis condition in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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

[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).

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 asbestosis condition and factors of his employment. Dr. Tan's referral report, which advised that appellant had a history of asbestos exposure with no objective evidence of asbestos-related lung disease, is the only rationalized, probative medical report in the record. Therefore, the Office properly found that Dr. Tan's opinion represented the weight of the medical evidence. Dr. Tan noted that appellant had an insignificant level of industrial exposure to asbestos and concluded based on the results of several diagnostic tests that he had no objective evidence of pulmonary disease. She, therefore, concluded that the industrial exposure to asbestos described by appellant was not sufficient to have caused an asbestos-related condition. Appellant, therefore, has failed to submit any rationalized, probative medical evidence establishing that the claimed condition of asbestosis 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. He, 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 December 21, 2000 decision is affirmed.

The Board finds that appellant had abandoned his request for a hearing before an Office hearing representative.

In a decision dated August 13, 2001, the Office found that appellant abandoned his January 21, 2001 request for an oral hearing before an Office hearing representative. The Office noted that the hearing was scheduled for July 24, 2001, that appellant received written notification of the hearing 30 days in advance, that appellant failed to appear and that the record contained no evidence that appellant contacted the Office to explain his failure to appear.

[4] *Id.*

[5] *See Id.*

Section 10.137 of Title 20 of the Code of Federal Regulations, revised as of April 1, 1997, previously set forth the criteria for abandonment:

> "A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant.
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> "A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for hearing that another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear to at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing."[6]

These regulations, however, were again revised as of April 1, 1999. Effective January 4, 1999, the regulations now make no provision for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.[7] Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.6e of the procedure manual, dated January 1999, provides as follows:

> "e. Abandonment of Hearing Requests.
>
> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.
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> "Under these circumstances, Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [District Office]. In cases involving prerecoupment hearings, Branch of Hearings and Review will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.
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> "(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, Branch of Hearings and Review

[6] 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

[7] 20 C.F.R. § 10.622(b) (1999).

should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

"This course of action is correct even if Branch of Hearings and Review can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[8]

In this case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on July 24, 2001. The record shows that the Office mailed appropriate notice to appellant at his last known address. The record also supports that appellant did not request postponement, that he failed to appear at the scheduled hearing and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office's procedure manual, the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

The August 13, 2001 and December 21, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 9, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record,* Chapter 2.1601.6.e (January 1999).