

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT O. WALLRATH and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Houston, TX

*Docket No. 01-235; Submitted on the Record;
Issued January 10, 2002*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether appellant sustained an asbestosis condition while in the performance of duty.

On May 8, 1998 appellant, then a 50-year-old welder, filed a claim for benefits based on occupational disease, alleging that he had developed a lung disease caused or aggravated by factors of his federal employment.

By letter dated June 16, 1998, the Office of Workers' Compensation Programs advised appellant that it required additional evidence in support of his claim.

In a letter received by the Office on July 15, 1998, appellant stated that he became aware that he had developed an asbestosis condition in February 1998, and that he was exposed to asbestos in his job with the employing establishment while repairing piping materials, air conditioners, steam lines, air handlers, pumps and motors, and was not provided with protective equipment. He further stated that he removed insulation from old steam tunnels and in the old hospital.

In a letter received by the Office on December 31, 1998, the employing establishment controverted the claim, asserting that appellant was never exposed to asbestos at his former work site.

Appellant submitted a February 10, 1999 report from Dr. Aamir S. Malik, Board-certified in internal medicine and a specialist in pulmonary medicine, who stated:

“In view of history of exposure to asbestos, the radiological findings of interstitial lung disease, the clinical symptoms and pulmonary function test results, this patient has asbestosis. He needs continued medical follow up to evaluate progression of disease or development of malignancy. He has increased risk due to exposure to asbestos and tobacco.”

In a decision dated March 1, 1999, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that his asbestosis condition was causally related to employment factors.

By letter dated March 8, 1999, appellant requested an oral hearing, which was held on July 15, 1999. At the hearing, he presented testimony from several coworkers indicating that he had been exposed to asbestos at his former work site. Appellant also submitted statements from other coworkers who corroborated his workplace exposure to asbestosis. In addition, he submitted notices of unsafe or unhealthful working conditions from the Department of Labor, dated June 15 and August 2, 1999, which indicated that certain buildings at appellant's former work site contained asbestos material.

By decision dated September 29, 1999, an Office hearing representative set aside the March 1, 1999 Office decision on the grounds that appellant had established that he was exposed to asbestos while working for the employing establishment. The hearing representative remanded the case for further development.

By letter dated October 21, 1999, the Office referred appellant for a second opinion examination with Dr. Bandra K. Rao, Board-certified in internal medicine and a specialist in pulmonary medicine. In a report dated December 10, 1999, Dr. Rao stated:

“[Appellant's] chest x-ray abnormality would be consistent with mild pulmonary asbestosis. However, the other more common features of pleural thickening and pleural calcification, etc., are lacking. Also, the minimal chest x-ray findings reported do not explain the degree of [appellant's] respiratory symptoms. Also, a latency period of about 15 years occurs before exposure and possible development of pulmonary asbestosis. This makes it unusual for the chest x-ray findings to be related to his asbestosis exposure. The first report in 1997 was just about eight years from the claimed start of his asbestos exposure.”

In a supplemental report dated September 12, 2000, Dr. Rao stated that, “after reviewing the history of [appellant's] clinical findings and chest x-ray, there was no evidence of pulmonary asbestosis.”

By decision dated September 27, 2000, the Office denied appellant's claim, finding that appellant failed to establish that his claimed asbestosis condition was causally related to employment factors.

The Board finds that the case is not in posture for decision.

In this case, Dr. Malik disagreed with Dr. Rao regarding whether appellant's work-related exposure to asbestos resulted in his asbestosis condition. In his February 10, 1999 report, Dr. Malik diagnosed asbestosis based on appellant's history, radiological findings of interstitial lung disease, clinical symptoms and pulmonary function test results. Dr. Rao stated that, although appellant's chest x-ray abnormalities would be consistent with mild pulmonary asbestosis, these findings did not explain the degree of his respiratory symptoms. Further he found the more common elements of asbestosis such as pleural thickening and calcification lacking and concluded that appellant did not have pulmonary asbestosis.

When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or “referee” physician, also known as an “impartial medical examiner.”¹ It was therefore incumbent upon the Office to refer the case to a properly selected impartial medical examiner, using the Office procedures, to resolve the existing conflict. Because the Office did not refer the case to an impartial medical examiner, there remains an unresolved conflict in medical opinion.

Accordingly, the case is remanded for referral of appellant, the case record and a statement of accepted facts to an appropriate impartial medical specialist selected in accordance with the Office’s procedures, to resolve the outstanding conflict in medical evidence. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The September 27, 2000 decision of the Office Workers’ Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
January 10, 2002

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹ Section 8123(a) of the Federal Employees’ Compensation Act provides in pertinent part: “[i]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.” *See Dallas E. Mopps*, 44 ECAB 454 (1993).