

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CORNELIUS BALLENTINE and DEPARTMENT OF THE NAVY,  
NORFOLK NAVAL SHIPYARD, Portsmouth, VA

*Docket No. 01-1938; Submitted on the Record;  
Issued March 15, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether appellant established that his asbestosis was caused by factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record as untimely.

On June 26, 2000 appellant, then a 72-year-old naval technician, filed a notice of occupational disease claiming that he developed asbestosis as a result of his federal employment.

By decision dated August 18, 2000, the Office denied appellant's claim since the evidence of record was insufficient to establish fact of injury.

Appellant submitted a May 17, 2000 report from Dr. Eric J. Freeman, a Board-certified internist, stating that appellant was being examined because of a chest x-ray abnormality.<sup>1</sup> Dr. Freeman indicated that appellant "generally had a significant exposure to asbestos dust for 20 years." He stated that appellant's history of asbestos dust exposure, his finding of rales on the physical examination, and the chest x-ray all indicated a diagnosis of pulmonary asbestosis. Appellant also submitted a pulmonary function test dated May 23, 2000.<sup>2</sup>

By letter dated March 27, 2001, appellant requested a review of the written record.

By decision dated June 27, 2001, the Office denied appellant's request as untimely.

The Board finds that appellant has not established that his asbestosis was caused by factors of his federal employment.

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<sup>1</sup> This x-ray is not found in the record.

<sup>2</sup> The report also indicates that appellant has smoked for 47 years.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>3</sup> has the burden of establishing 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.<sup>4</sup> These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>5</sup>

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.<sup>6</sup>

The medical evidence required to establish a causal relationship is rationalized medical opinion 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.<sup>7</sup>

In this case, Dr. Freeman diagnosed appellant with pulmonary asbestosis yet provided no medical rationale. He discussed appellant's history of asbestos dust exposure and indicated that there were a few early inspiratory rales heard in the left chest posterolaterally. He mentioned an April 10, 2000 chest x-ray and stated that the appearance of the x-ray also indicated a diagnosis of pulmonary asbestosis, yet this x-ray is not found in the record. Appellant also submitted a pulmonary function report dated May 23, 2000; however, this report only contains numbers and percentages and some impressions of the physician, but does not contain a physician's medical opinion. Dr. Freeman's May 17, 2000 report diagnoses appellant with pulmonary asbestosis, yet offers no medical rationale explaining the relationship between the diagnosed condition and appellant's employment. It is appellant's burden of proof to submit a physician's rationalized

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>5</sup> *Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

<sup>6</sup> *Vicky L. Hannis*, 48 ECAB 538 (1997).

<sup>7</sup> *Supra* note 5.

opinion on the issue of whether there is a causal relationship between his diagnosed condition and the implicated employment factors.<sup>8</sup>

Since the medical evidence does not establish a causal relationship between appellant's diagnosed condition and his employment, he has not met his burden of proof in establishing his claim.

The Board also finds that the Office properly denied appellant's request for a review of the written record as untimely.

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu, thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which a hearing is sought.<sup>9</sup>

Appellant's request for a review of the written record was dated March 27, 2001 and received by the Office on April 16, 2001, which is more than 30 days after the Office's August 18, 2000 decision. As such, appellant is not entitled to a review of the written record as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that the issue of whether he established that he sustained an injury in the performance of duty causally related to factors of his federal employment could equally well be addressed by requesting reconsideration.<sup>10</sup> Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a review of the written record.

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<sup>8</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>9</sup> 20 C.F.R. § 10.616(a) (1999).

<sup>10</sup> The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g.*, *Jeff Micono*, 39 ECAB 617 (1988).

Accordingly, the June 27, 2001 and August 18, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
March 15, 2002

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member