U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GORDON SNOW and DEPARTMENT OF THE NAVY,
NAVAL CONSTRUCTION BATTALION CENTER,
Port Hueneme, CA

Docket No. 03-1163; Submitted on the Record;
Issued August 22, 2003

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied appellant compensation for the period commencing August 10, 1999.

The Office accepted appellant's claim for benign asbestos pleural effusion (BAPE) due to exposure to asbestos from 1969 to 1975 and 1982 to 1994. On December 6, 2001 appellant filed a claim for continuing disability commencing August 10, 1999. Appellant retired from the employing establishment effective May 3, 1994. From 1975 to 1982 appellant was also self-employed as a real estate agent.

In a report dated October 9, 2001, the referral physician, Dr. Ronald A. Popper, a Board-certified internist with a specialty in pulmonary diseases, considered appellant's history of injury, performed a physical examination and reviewed pulmonary function studies. Dr. Popper diagnosed, *inter alia*, asbestosis exposure, chronic obstructive pulmonary disease, hypertension, obesity and chest pain. He stated that the "most likely diagnosis related to this patient's history of asbestos exposure is [BAPE]." He stated that appellant's employment exposure was a direct cause of his BAPE. Dr. Popper stated that it "is entirely unclear what role [appellant's] asbestosis has in his complaint of dyspnea, as he has several comorbid conditions that may contribute to his dyspnea." Stating that he used the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (without specifying the edition), Dr. Popper stated that appellant had a 25 percent impairment to the whole person but "it is likely" that the impairment related to his more than 60 packs per year cigarette consumption history rather than his asbestos exposure. Dr. Popper stated that additional factors contributing to appellant's dyspnea included his morbid obesity, sedentary lifestyle, uncontrolled hypertension and possible obstructive sleep apnea syndrome.

In an attending physician's report dated December 4, 2001, appellant's treating physician, Dr. Sanjiv Goel, a Board-certified internist with a specialty in cardiovascular disease, diagnosed BAPE and checked the "yes" box, stating that the condition was work related and was due to

multiple progressive exposure to asbestosis over the years. Dr. Goel stated that appellant was totally disabled as of August 10, 1999. In a report dated January 29, 2002, he stated that appellant had progressively worsening breathing ability caused by asbestosis disease. Dr. Goel stated that appellant affirmed that because of breathing restriction and shortness of breath upon walking over several feet, he experienced upper chest pain in both lungs. Dr. Goel stated that the immobility and cessation of energy actions such as walking or repetitive movements required complete rest for a period of time to regain any type of near normal breathing rhythm. He stated that appellant had recurring pleural effusion and pneumonia episodes and had undergone thoracentesis procedures.

In a report dated May 29, 2002, Dr. Goel stated that appellant's pleural effusion, in fluid form, had solidified to the inner walls of the lungs, which was consistent with the effects of asbestosis. He stated that Dr. Gurdip Singh Flora, a pulmonary physician, to whom he referred appellant, performed an examination and specialized pulmonary testing, which supported a diagnosis of BAPE and Dr. Flora found asbestos-induced disease on August 10, 1999. Dr. Goel stated that the opinion of Dr. Popper confirmed the diagnosis of asbestosis on October 9, 2001.

In a report dated February 25, 2002, an Office medical consultant, Dr. Charles C. McDonald, a Board-certified internist with a specialty in pulmonary disease, opined that the record was incomplete and further pulmonary function studies should be conducted, with spirometry performed before and after the bronchodilators. Dr. McDonald also recommended that appellant undergo a computerized axial tomography (CAT) scan.

By decision dated May 31, 2002, the Office denied the claim, stating that the evidence of record failed to establish that he was disabled for work commencing August 10, 1999 due to the accepted injury.

By letter dated June 7, 2002, appellant requested an oral hearing before an Office hearing representative, which was held on November 21, 2002. At the hearing, appellant described his work history and medical treatment. Appellant stated that contrary to Dr. Popper's finding that he had pneumonia 35 times in his life, he only had pneumonia 3 to 5 times. He asserted that he was not morbidly obese and the Office hearing representative agreed. Appellant described his symptoms, stating that he could not walk more than a half of a block without losing his breath, that he was unable to take deep breaths and that, when he was around the house, he was in bed most of the time. Appellant stated that he was unable to do any household chores such as mowing the lawn or taking out the trash.

In a report dated August 1, 2002, Dr. Popper performed additional pulmonary function studies and a CAT scan and noted that no pleural effusion was apparent in the CAT scan, but appellant had a pleural-based soft tissue density within the posteromedial left lower lobe. He opined in view of appellant's known asbestos and tobacco exposure, it might be a pulmonary malignancy. Dr. Popper reiterated the conclusions in his prior report, stating that "[g]iven the absence of widespread pleural plaquing, pleural thickening or significant interstitial lung disease on the most recent CAT scan and even if the pleural based left lower lob lesion is asbestos related, … it [was] entirely unclear what role, if any, [appellant's] asbestos exposure has in his complaint of dyspnea as he has other comorbid medical conditions that may more greatly contribute to his complaint of dyspnea." Dr. Popper again referred to the A.M.A., *Guides* and

stated that it was "likely" that appellant's impairment related more to his cigarette consumption history and resulting chronic obstructive pulmonary disease than to his asbestos exposure based on the lack of findings." Dr. Popper opined that appellant's dyspnea was permanent.

In a report dated November 6, 2002, Dr. Goel stated that he was currently treating appellant for cardiac-related issues and that his blood pressure was under control with medication. He stated that appellant had been diagnosed with asbestosis, which caused progressive thickening around the lungs and calcification, which had been shown on x-rays. Dr. Goel stated that appellant had difficulty breathing and could not exercise or utilize everyday mobility energy because of constricted breathing. He stated that there was no cure for asbestosis, that appellant had been unable to work since the asbestosis manifested itself and would be unable to work again.

By decision dated and finalized February 5, 2003, the Office hearing representative affirmed the Office's May 31, 2002 decision.

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

Appellant has the burden to establish continuing disability due to a work-related injury.[1] To establish disability, appellant must submit evidence from a qualified physician who on the basis of a complete and accurate factual and medical history, concluded that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[2]

In this case, a conflict exists in the medical evidence between the opinion of the referral physician, Dr. Popper, that appellant's dyspnea might have been caused by his smoking history and resulting chronic obstructive pulmonary disease, hypertension, sedentary lifestyle and obesity and the opinion of appellant's treating physician, Dr. Goel, that appellant's dyspnea was due to his asbestos exposure at work. Section 8123(a) of the Federal Employees' Compensation Act provides that, if there is a disagreement between the physician making the examination for the United Stated and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[3] The case shall, therefore, be remanded for the Office to refer appellant, with a statement of accepted facts and the case record, to an appropriate specialist, to determine whether appellant's dyspnea is related to his asbestos exposure at the employing establishment. After any further development it deems necessary, the Office shall issue a *de novo* decision.

[1] *Donald Leroy Ballard*, 43 ECAB 876, 882 (1992).

[2] *See Carolyn F. Allen*, 47 ECAB 240, 245 (1995); *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

[3] *Henry W. Sheperd, III*, 48 ECAB 382, 385 n.6 (1997); *Wen Ling Chang*, 48 ECAB 272-74 (1997).

The February 5, 2003 and May 31, 2002 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further consideration consistent with this decision.

Dated, Washington, DC
August 22, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member