

asbestos insulation and he personally handled asbestos products. Appellant indicated that he retired from the employing establishment in 1993.

By letter dated July 10, 2002, the Office advised appellant that he had not submitted sufficient evidence to establish his claim. The Office further addressed the type of factual and medical evidence he needed to submit to establish his claim. By letter of the same date, the Office requested that the employing establishment submit, among other things, comments regarding the accuracy of appellant's comments and any exposure data including, his last exposure to asbestos at work and his medical records.

The Office received medical records including, diagnostic test results from the employing establishment's clinic and a December 6, 2001 medical report from Dr. Richard C. Bernstein, a Board-certified internist and appellant's treating physician, finding that he had mild asbestosis based on his long history of asbestos exposure and latency period since exposure, his findings on chest x-ray and pulmonary function testing and diagnosis of pleural disease and dyspnea on exertion. The Office also received appellant's statement regarding his employment history and injury, statements from the employing establishment controverting appellant's claim and employment records.

In an August 19, 2002 decision, the Office found that the evidence of record was insufficient to establish that appellant sustained an injury in the performance of duty. The Office found that the medical reports from the employing establishment demonstrated that appellant's chest examination was normal.

In a September 10, 2002 letter, appellant requested a review of the written record by an Office hearing representative. On February 14, 2002 the Office hearing representative issued a decision finding that Dr. Bernstein's December 6, 2001 report was supportive of asbestos exposure resulting in mild asbestosis, which required a review of the case record by an Office medical adviser. Accordingly, the hearing representative set aside the Office's decision and remanded the case for further development.

In a May 11, 2003 medical report, an Office medical adviser provided a detailed review of appellant's medical records and a statement of accepted facts. He noted a history of him smoking, medical and family background. The Office medical adviser opined that appellant did not have asbestos related lung disease or asbestosis and that he had a zero percent impairment of the whole person based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

On June 3, 2003 the Office found a conflict in the medical opinion evidence between Dr. Bernstein and the Office medical adviser as to whether appellant sustained asbestosis casually related to his federal employment. The Office referred appellant, together with a statement of accepted facts, medical records and a list of specific questions to Dr. Eric Freeman, a Board-certified internist specializing in pulmonary diseases, by letter dated June 17, 2003, to resolve the conflict.

Dr. Freeman submitted an August 26, 2003 medical report, in which he provided a history of appellant's employment, exposure to asbestos at the employing establishment and

noted complaints of shortness of breath for several years, chest pains on and off and occasional leg pain. He reviewed the statement of accepted facts and found it supportive of the history provided by appellant. Dr. Freeman provided a review of his medical background and medical records. He noted his findings on physical examination and found no evidence of pulmonary asbestosis upon evaluation, despite appellant's history of asbestos exposure. Dr. Freeman stated that appellant's physical findings did not reveal characteristic abnormalities suggestive of asbestosis. He also stated that appellant's chest x-ray appeared to be normal as it did not show abnormalities suggestive of asbestosis or any other pleural abnormalities as confirmed by a high resolution computerized tomography (CT) scan of the chest which revealed no evidence of pulmonary asbestosis and was interpreted as normal. Dr. Freeman noted that pulmonary function tests also revealed no abnormality and were interpreted as normal. He stated that Dr. Bernstein's finding of abnormalities on pulmonary function testing and chest x-ray could not be duplicated on his evaluation and the high resolution CT scan of the chest confirmed that there was no evidence of pulmonary asbestosis, including an absence of pulmonary fibrosis and pleural disease.

In response to the Office's questions, Dr. Freeman stated that there was no diagnosis of pulmonary asbestosis because the physical examination, pulmonary function tests, chest x-ray and CT scan of the chest all indicated a normal pulmonary examination. He concluded that there was no diagnosis related to appellant's federal work history. Dr. Freeman also stated that since there was no diagnosis, there was no prognosis. He responded that appellant had no work restrictions related to a lung condition, but had restrictions due to his other medical conditions and age. Dr. Freeman also responded that appellant did not have any preexisting conditions and there was no date of maximum medical improvement. He submitted diagnostic test results that served as a basis for his opinion.

By decision dated September 30, 2003, the Office found the evidence of record insufficient to establish that appellant sustained an injury in the performance of duty. The Office found that the weight of the medical opinion evidence rested with the opinion of Dr. Freeman.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of 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 compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

³ *See Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

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. 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.⁴

The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.⁵

ANALYSIS

In this case, the Office properly determined that a conflict existed in the medical opinion evidence between Dr. Bernstein, appellant's treating physician, who opined that appellant had mild asbestosis and an Office medical adviser, who opined that appellant did not have asbestosis. To resolve the conflict, the Office referred him to Dr. Freeman, a Board-certified pulmonary specialist, for a complete medical examination. The Board has held that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence, the opinion of the specialist, if sufficiently well rationalized and based on a proper medical background, must be given special weight.⁶

In an August 26, 2003 medical report, Dr. Freeman explained that appellant did not have asbestosis causally related to his federal employment as there were no physical or diagnostic findings demonstrating that he sustained this condition, due to any employment exposure. The Board finds that his opinion is well rationalized and based on an accurate factual and medical background. Dr. Freeman not only examined appellant, but also reviewed his medical records. He also reported accurate medical and employment histories. The Board finds that the Office properly accorded determinative weight to the impartial medical examiner's August 26, 2003 findings.

⁴ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

⁵ 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

⁶ *Mary A. Moultry*, 48 ECAB 566 (1997).

Although the Office advised appellant about the type of medical evidence needed to establish his claim, he failed to submit medical evidence responsive to the request.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member