United States Department of Labor
Employees' Compensation Appeals Board

SAMUEL KEIM, Appellant	)	
and	)	**Docket No. 04-357**
	)	**Issued: August 3, 2004**
DEPARTMENT OF DEFENSE, NEW CUMBERLAND DEPOT FIRE DEPARTMENT, New Cumberland, PA, Employer	)	

Appearances:
Samuel Keim, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 24, 2003 appellant filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs dated September 9, 2003, finding that he failed to establish that he sustained an injury in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained an injury in the performance of duty.

FACTUAL HISTORY

On October 17, 2002 appellant, then a 51-year-old firefighter, filed an occupational disease claim alleging that he first became aware of his tuberculosis (TB) and realized that his condition was caused or aggravated by his employment on October 9, 2002. Appellant stated that on October 7, 2002 he was given a TB test during his annual physical examination at the

employing establishment's clinic. When he returned for a "recheck" on October 9, 2002 he was advised of a positive test result. Appellant received a referral for a chest x-ray to be performed on October 11, 2002.

In support of his claim, appellant submitted a statement revealing that he worked as an ambulance/emergency medical services driver for the employing establishment for the last 20 years. He reiterated that he had an annual TB test performed on October 7, 2002 which he learned was positive on October 9, 2002. Appellant stated that a chest x-ray performed on October 11, 2002 was negative. He noted that he had an appointment with Dr. Donald E. Potter, Jr., an employing establishment physician specializing in general preventive medicine, who notified Fort Meade of his condition and that personnel from Fort Meade recommended further testing or treatment to his family physician. Appellant stated that he had no prior history of exposure to TB.

In an undated statement, Scott Reichenbach, assistant fire chief of the employing establishment, described appellant's work duties. Mr. Reichenbach stated that appellant worked a 24-hour a day, 72-hour a week work schedule. He further stated that appellant performed the duties of a firefighter and driver operator, ambulance attendant and driver operator, hazardous materials technician, confined space technician and various other duties performed by the fire department. He further stated at that time it was unknown to appellant and himself as to when, where or how appellant may have come into contact with anyone or anything carrying TB.

Appellant also submitted a January 13, 2002 notification of personnel action and a leave and earnings statement for the pay period ending October 5, 2002. Further, he submitted medical treatment notes dated October 9, 10 and 11, 2002 of Dr. Potter and registered nurses, one whose signature is illegible and Deborah Helsey-DeWolf, which were signed by Dr. Potter. The October 9, 2002 treatment notes of the nurse whose signature is illegible revealed that on October 6, 2002 at approximately 6:30 a.m. appellant was dispatched to transport a patient to the hospital. The treatment notes further indicated that the patient vomited onto appellant's face, head and chest area and that appellant washed off. Physical examination findings revealed a raised area on appellant's right forearm. Appellant submitted the October 18 and November 12 and 19, 2002 medical treatment notes of Dr. William Bush, an internist. In his October 18, 2002 treatment notes, Dr. Bush questioned whether appellant had possible contact with a patient during an ambulance call. An October 14, 2002 chest x-ray report from Dr. Henry K. Smith, an osteopath, revealed that appellant had no TB or other active disease.

By letter dated January 16, 2003, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office further advised appellant about the type of evidence he needed to submit to establish his claim. The Office requested that appellant identify location(s) where he was exposed to the source(s) of his infection, to whom he was exposed to and in what manner, the dates of his exposure, the length of his exposure and the names of other individuals who were exposed. The Office also requested that appellant submit a description of each episode of the infection he previously experienced including, a description of his medical treatment and names of his treating physicians. The Office advised appellant to submit a comprehensive medical report from his treating physician regarding his TB condition. The Office also advised the employing establishment by copy of this letter to submit information in response to appellant's claim.

In a January 30, 2003 letter, Dr. Potter responded to the Office's letter. He stated that appellant could have been exposed to TB at any time after his last TB test in 1998 to his positive reaction in October 2002 based on his job duties and exposure to patients with multiple diseases. He further stated that, since appellant's family members had all been tested and found to be negative for TB exposure, we can only assume that appellant was exposed on duty as a federal firefighter. Dr. Potter concluded that, although appellant's chest x-ray was negative for active disease and was not considered contagious or demonstrated TB, appellant needed prophylactic treatment with medication for the next nine months.

In a February 6, 2003 response letter, Mr. Reichenbach again noted appellant's job duties, which included responding with the department ambulance to medical emergencies on and off of the employing establishment's installation. He stated:

> "[Appellant] and his coworkers are often exposed to patients who may carry or have been exposed themselves to various diseases. In almost all cases [appellant] and his coworkers diagnose, provide basic life support and transport patients to a hospital or clinic never fully aware of what all diseases these people are carrying. After the patient is seen in a care facility the staff may not even diagnose the fact that this patient could be carrying a disease of this nature. These patients are usually treated for their chief complaint and released. A full and total diagnosis is rarely completed and even if a disease of this nature is detected we can only hope that the care facility staff would contact our department to inform our responders."

Mr. Reichenbach pointed out, noting that Dr. Potter's letter would confirm his position, that it was virtually impossible to point a finger at one medical response that may have caused appellant to be exposed to TB. He stated that appellant and his coworkers were trained in the proper use of personal protective equipment and utilized this equipment on a regular basis but nothing was 100 percent effective, 100 percent of the time. Mr. Reichenbach indicated that he understood that appellant's family had tested negative for TB exposure and stated that we can only presume that appellant was exposed while performing his duties as an emergency medical responder with the employing establishment.

In a February 11, 2003 response letter, appellant reiterated that he had a routine TB test, which showed that he had been exposed to the disease and that a chest x-ray demonstrated that TB had not entered into his lungs. He noted that testing of his family including, his wife, son, future daughter-in-law, son-in-law and two 12-year-old grandsons was negative for TB exposure. He submitted a response data list covering the period June 15, 1999 through January 23, 2003 and providing the date, time and incident location. Appellant indicated that some calls were on the base in Susquehanna and New Cumberland, Pennsylvania and others were off base in mutual aid calls with Fairview Township and neighboring areas. He further indicated that, due to patient/doctor confidentiality, the names of the patients, their conditions and their overall health issues were not revealed. Appellant concluded that it must be assumed that the exposure to TB came from performing his duties as a federal firefighter. Subsequently, the Office received a duplicate copy of Dr. Bush's October 18 and November 12 and 19, 2002 treatment notes.

By decision dated September 9, 2003, the Office found the evidence of record insufficient to establish that the event occurred as alleged. The Office stated that no evidence had been presented, which documented appellant's exposure to TB in the performance of his duties.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his 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]

The Office has established special procedures for adjudicating cases of pulmonary TB. FECA Bulletin No. 95-20 (issued June 21, 1995) reiterated and expanded these procedures as follows:

> "Background: While the incidence of TB in the general population had been on the decline for several decades, it began to rise again at the end of the 1980's and continues to increase at the present time. Certain strains now prevalent are resistant to some or all of the drug treatments available.
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> "These developments have heightened concern among agencies whose employees routinely come into contact with members of groups who have a statistically high risk of having TB. The CDC has identified certain kinds of workplaces to be high risk settings for TB infection. These settings include health care facilities, correctional institutions and drug treatment centers, among others. Employees, who may, therefore, have increased risk of exposure include doctors and nurses in hospitals administered by the Department of Veterans Affairs, agents of the U.S. Marshals Service and workers in the Federal prison system.
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> "While the Act has long had procedures for addressing cases involving infectious diseases, including TB, it has recently come to our attention that they have not been uniformly followed in all district offices. This problem, along with the need to ensure that we consider the various circumstances under which exposure may occur, have led us to reiterate and expand our procedures in this area.

[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).

"Action:

"1. The development letter to claimants for pulmonary diseases other than asbestosis (Exhibit 16 of PM Chapter 2.806) asks for a detailed description of the work-related exposure. This question continues to be valid, but where TB is claimed, it is not necessary to obtain the names of specific persons to whom the employee was exposed. Repeated exposure to populations such as prisoners, hospital patients and IV drug users is sufficient to establish work-related exposure.

"2. Claims Examiners must continue to inquire about nonwork exposure. However, if the claimant and the treating physician deny nonwork-related exposure and work-related exposure has been established, the case should be accepted if evidence of TB infection is present.

"3. If both nonwork-related and work-related exposure are involved, the amount and duration of exposure, as well as the length of time between alleged exposure and emergence of signs or symptoms, must be considered in determining whether the condition is work related (*see* PM Chapter 2.805.4b(2) for a discussion of this point).

"4. Evidence of TB infection includes a positive TB skin test. Other medical evidence required, as noted in MEDGUIDE Chapter 4.6 includes a chest x-ray, sputum tests and copies of preemployment physical examinations.

"5. Prophylactic treatment (INH therapy) may be authorized based on a positive skin test, even if the x-ray and/or sputum tests are negative. (If these latter two tests are positive, other forms of therapy will likely be employed as well.)"

ANALYSIS

In this case, from June 15, 1999 through January 23, 2003, appellant's duties as a firefighter brought him into repeated close contact with various persons who required emergency medical treatment. Dr. Potter's October 9, 2002 description of a patient vomiting onto appellant's face, head and chest area on October 6, 2002 and his finding that appellant had a raised area on his right forearm graphically illustrates how appellant encountered a possible risk of exposure to TB in the course of his employment.

Mr. Reichenbach stated that, in responding with the employing establishment's ambulance to medical emergencies, appellant and his coworkers "are often exposed to patients who may carry or have been exposed themselves to various diseases" and are "never fully aware of what all diseases these people are carrying." He further stated that, after the patient is seen in a care facility, the staff may not even diagnose a disease such as TB and the only hope was that the care facility staff would contact his department so that the responders could be informed.

Appellant's repeated exposure to persons with various illnesses as an emergency medical services driver is sufficient under FECA Bulletin No. 95-20, to establish work-related exposure. Both appellant and Dr. Potter, the employing establishment's physician, denied nonwork-related

exposure. Dr. Potter reported that appellant had a positive reaction to a TB skin test in October 2002, though a chest x-ray showed no evidence of active TB. He stated that appellant could have been exposed to TB at any time after his last TB test in 1998 to his positive reaction in October 2002 based on his job duties and exposure to patients with multiple diseases. He also stated that, since appellant's family members tested negative for TB exposure, he could only assume that appellant was exposed to the disease as a federal firefighter. Inasmuch as work-related exposure has been established, nonwork-related exposure has been denied and evidence demonstrating that TB infection was present, the Board finds that appellant's case must be accepted under the Office's special procedures for adjudicating cases of pulmonary TB. Appellant has met his burden of proof.

Although the Act does not authorize payment for preventive measures such as vaccines and inoculations, the Office can authorize treatment for conversion of tuberculin reaction from negative to positive following exposure to TB in the performance of duty. Regulation implementing the Act expressly provide that the Office may authorize appropriate therapy in this situation.[4] As noted above, FECA Bulletin No. 95-20 states that prophylactic treatment may be authorized based on a positive skin test. The record in this case establishes that appellant had a positive TB test.

Based on the foregoing, the Board will reverse the denial of appellant's claim and will remand the case for appropriate benefits, including such treatment or therapy as the Office may authorize.

CONCLUSION

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

[4] 20 C.F.R. § 10.313(c) (2003).

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2003 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further action consistent with this decision.

Issued: August 3, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member