United States Department of Labor
Employees' Compensation Appeals Board

JANICE DUKES, Executrix for the Estate of HAROLD L. DUKES, SR., Appellant **and** **TENNESSEE VALLEY AUTHORITY, PARADISE STEAM PLANT, Drakesboro, KY, Employer**	)	**Docket No. 04-715** **Issued: August 4, 2004**

Appearances:
Ronald K. Bruce, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On January 21, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 22, 2003 which denied the employee's claim for an occupational disease. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue on appeal is whether appellant has met her burden of proof in establishing that the employee developed pneumoconiosis, asbestosis and lung cancer while in the performance of duty.

FACTUAL HISTORY

On June 21, 2001 the employee, then a 68-year-old laborer, filed an occupational disease claim alleging that he developed pneumoconiosis, asbestosis and cancer while in the performance of duty. The employee became aware of his condition on May 25, 2001.[1] He retired on October 7, 1986.[2]

In support of his claim, the employee submitted employing establishment records from July 1974 to August 4, 1986 which noted his treatment for a shoulder injury and minor illnesses. A pulmonary function report performed June 19, 1985 revealed no abnormalities. Other reports from Dr. William M. O'Bryan, a Board-certified internist with a subspecialty in pulmonary disease, dated May 25 to June 11, 2001, noted the employee's work history, indicating that he was exposed to asbestos while working on boilers in the U.S. Navy and at the employing establishment. He indicated that a chest x-ray revealed calcification of the right hemidiaphragm and plaques consistent with asbestosis. In a report dated June 11, 2001, Dr. O'Bryan diagnosed T4 squamous cell carcinoma of the right upper lobe orifice and low right trachea, and general debility secondary to rheumatoid disease, bullous lung disease, asbestosis and black lung pneumoconiosis.

Appellant's records were reviewed by Dr. Jon A. Sherrod, a Board-certified internist and Office referral physician, who opined, in an undated report, that appellant's lung cancer was the result of smoking. He indicated that, although the computerized axial tomography (CAT) scan of the chest dated May 18, 2001 revealed calcification of the right hemidiaphragm suggestive of asbestosis, there did not appear to be any definite biopsy or pathologically proven evidence of asbestosis, anthracosilicosis or pneumoconiosis.

The Office was informed that the employee died on January 9, 2002. The employee's widow, hereinafter referred to as appellant, submitted medical records from Dr. O'Bryan who noted performing bronchoscope's on June 6, July 11 and October 3, 2001 which revealed squamous cell carcinoma of the right upper lobe. He diagnosed squamous cell carcinoma of the right upper lobe orifice and low right trachea, rheumatoid disease, bullous lung disease, asbestosis and probable black lung pneumoconiosis. The physicians report dated November 14, 2001, noted that a chest x-ray revealed interstitial fibrosis, asbestosis, asbestos plaquing with calcification of the right central diaphragmatic tendon. An autopsy was performed on March 3, 2002 and diagnosed lobar pneumonia, bilateral emphysema, squamous cell carcinoma of the upper lobe of the right lung and the lung examination revealed severe diffuse bilateral pleural plaques.

On August 9, 2002 the Office referred the employee's case for a second opinion to Dr. Leonard Y. Cosmo, a Board-certified internist with a subspecialty in pulmonary disease. In a report dated August 19, 2002, Dr. Cosmo indicated that he reviewed the records provided to him. He noted a work history with exposure to asbestos and advised that chest x-rays and a CAT scan

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[1] The employee died on January 9, 2002 and the cause of death was pneumonia and lung cancer.

[2] The Board notes that the employee filed a claim for a schedule award on June 21, 2001. However, the Office has not issued a decision on the schedule award, and therefore this matter is not before the Board at this time.

of the chest revealed a large mass in the right upper lung, calcifications of the right hemidiaphragm and pleural plaques bilaterally. Dr. Cosmo diagnosed severe chronic obstructive pulmonary disease, bullous emphysema secondary to heavy tobacco use and lung cancer. He opined that the employee's death was caused by pneumonia as a complication of severe lung cancer, underlying emphysematous and chronic obstructive pulmonary disease. Dr. Cosmo neither found that the employee's death was related to his asbestos exposure nor that he believed that asbestos was a contributing factor to any significant pulmonary impairment or disability, but merely noted that the employee had radiographic findings that were consistent with exposure to asbestos.

In a decision dated September 17, 2002, the Office denied the employee's claim on the grounds that the medical evidence was not sufficient to establish that his condition was caused by the his employment duties as required by the Federal Employees' Compensation Act.[3]

On October 8, 2002 appellant requested an oral hearing before an Office hearing representative. The hearing was held on July 9, 2003. Appellant submitted a report from Dr. O'Bryan dated June 16, 2003, who diagnosed asbestosis, asbestos pleural disease with plaques and adhesions, and probable black lung pneumoconiosis. He opined that the employee suffered occupational lung disease in the form of asbestosis, lung cancer, asbestos pleural disease and probable black lung pneumoconiosis. Also submitted was a report from Dr. Glen Baker, a Board-certified internist with a subspecialty in pulmonary disease, dated June 27, 2003. He noted that the employee was a boiler technician from 1951 to 1970 with the Navy and worked at the employing establishment from 1974 to 1986 and was exposed to asbestos while working on boilers. Dr. Baker noted that chest x-ray's and a CAT scan of the chest revealed a mass in the right upper lobe, calcifications of the dome of the right hemidiaphragm and pleural plaques bilaterally. Dr. Baker determined the cause of death to be pneumonia superimposed on lung cancer. He further opined that the employee's lung cancer was related to his asbestos exposure; however, he noted that it would be difficult to say whether it was from the Navy exposure from 1951 to 1970 or the exposure at the employing establishment from 1974 to 1986.

By decision dated October 22, 2003, the hearing representative affirmed the decision of the Office dated September 17, 2002.

LEGAL PRECEDENT

An employee seeking benefits under the Act has the burden of establishing the essential elements of his or 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 the 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

[3] 5 U.S.C. §§ 8101-8193.

[4] *Gary J. Watling*, 52 ECAB 357 (2001).

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) 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 causal relationship is generally 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.[5]

ANALYSIS

In August 2002 the Office referred appellant for a second opinion to Dr. Cosmo. In his report dated August 19, 2002, Dr. Cosmo diagnosed severe chronic obstructive pulmonary disease (COPD), bullous emphysema secondary to heavy tobacco use and lung cancer. He noted that the pulmonary function tests were within normal ranges. Dr. Cosmo opined that the employee's death was caused by pneumonia as a complication of severe lung cancer, underlying emphysematous and COPD. He neither found that the employee's death was related to his asbestos exposure nor did he believe that asbestos was a contributing factor to any significant pulmonary impairment or disability, but merely noted that the employee had radiographic findings that were consistent with exposure to asbestos.

Appellant submitted numerous reports from his treating physician, Dr. O'Bryan, who on June 11, 2001 noted a history of appellant's asbestos exposure and diagnosed T4 squamous cell carcinoma of the right upper lobe orifice and low right trachea, and general debility secondary to rheumatoid disease, bullous lung disease, asbestosis and black lung pneumoconiosis. He noted that chest x-ray's revealed calcification of the right hemidiaphragm, and plaques consistent with asbestosis. Dr. O'Bryan's report dated November 14, 2001 and June 16, 2003, concluded that the employee suffered occupational lung disease in the form of asbestosis, lung cancer, asbestos pleural disease and probable black lung pneumoconiosis. While Dr. O'Bryan reported that appellant had developed lung cancer, asbestosis and possible pneumoconiosis, which he opined was due to occupational exposure to asbestos, he neither provided a definitive diagnosis of appellant's condition nor provided a well-reasoned discussion explaining if, and how, lung cancer, asbestosis and possible pneumoconiosis was causally related to appellant's workplace

[5] *Solomon Polen*, 51 ECAB 341 (2000).

exposure to asbestos. Without any explanation or rationale for the conclusion reached, this is insufficient to meet appellant's burden of proof.[6]

Also submitted was a report from Dr. Baker dated June 27, 2003, who noted that appellant's occupational exposure to asbestos occurred while he was employed as a boiler technician from 1951 to 1970 with the Navy and from 1974 to 1986 with the Tennessee Valley Authority. He determined that the cause of death was pneumonia superimposed on lung cancer. Although he opined that the employee's lung cancer was related to his asbestos exposure, Dr. Baker only offered speculative support for causal relationship by opining that it would be difficult to say whether the actual cause of appellants condition was from exposure while working for the Navy from 1951 to 1970 or the exposure at the Tennessee Valley Authority from 1974 to 1986. The Board has held that speculative and equivocal medical opinions regarding causal relationship have no probative value.[7] Additionally, his report did not include a rationalized opinion regarding the causal relationship between appellant's lung cancer and his exposure to asbestos.[8] Therefore, this report is insufficient to meet appellant's burden of proof.

The Board finds that, under the circumstances of this case, the opinion of Dr. Cosmo is sufficiently well rationalized and based upon a proper factual background such that it is the weight of the evidence and established that appellant did not develop pneumoconiosis, asbestosis and lung cancer in the performance of duty.

CONCLUSION

The Board therefore finds that appellant did not meet her burden of proof in establishing that the employee developed pneumoconiosis, asbestosis and lung cancer in the performance of duty.[9]

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[6] *Jimmie H. Duckett,* 52 ECAB 332 (2001); *Franklin D. Haislah,* 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[7] Speculative and equivocal medical opinions regarding causal relationship have no probative value; *see Alberta S. Williamson,* 47 ECAB 569 (1996); *Frederick H. Coward, Jr.,* 41 ECAB 843 (1990); *Paul E. Davis,* 30 ECAB 461 (1979).

[8] *Jimmie H. Duckett, supra* note 6.

[9] *See Calvin E. King,* 51 ECAB 394 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 22, 2003 is affirmed.

Issued: August 4, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member