

**United States Department of Labor
Employees' Compensation Appeals Board**

RICHARD J. ELDERKIN, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Naugatuck, CT, Employer**

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**Docket No. 04-1047
Issued: August 2, 2004**

Appearances:
Richard J. Elderkin, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On March 10, 2004 appellant filed a timely appeal from the December 3, 2003 merit decision of the Office of Workers' Compensation Programs, which denied compensation on the grounds that he failed to establish an occupational exposure to asbestos or an injury resulting therefrom. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's December 3, 2003 decision.¹

ISSUE

The issue is whether appellant is entitled to compensation benefits under the Federal Employees' Compensation Act based on exposure to asbestos in the workplace.

¹ The Office also issued a decision on February 26, 2004 finding that appellant was not entitled to a hearing as a matter of right because his request for an oral hearing was postmarked on January 9, 2004 more than 30 days after the Office's December 3, 2003 decision. Appellant does not appeal the Office's February 26, 2004 decision and makes no argument relevant to the issue decided therein.

FACTUAL HISTORY

On June 26, 2003 appellant, then a 53-year-old fireman laborer, filed a notice of occupational disease and claim for compensation alleging that he was exposed to friable asbestos at work between 1984 and 1989 and again in the late 1990s. Asked to describe the nature of the disease or illness, he stated: “Exposure to friable asbestos.” With his signature appellant certified that the disease or illness described was a result of his federal employment and he claimed medical treatment, if needed and other benefits provided by the Act. In an attached statement, he asked the Office to have the employing establishment arrange asbestos-related testing. Appellant stated that he had been experiencing pains in his back and chest.²

On August 12, 2003 the Office advised appellant that it required a definitive diagnosis from a physician and a well-reasoned medical opinion that the condition was work related. The Office requested that he submit additional information and evidence within approximately 30 days.

Appellant responded on September 8, 2003. He provided additional information and related his experience with the employing establishment. Appellant made clear what he was requesting:

“It’s important to note that I am not claiming a disease or illness at this time.

“1. I am only requesting that I have an asbestos[-]related pulmonary test by the [employing establishment] since I was exposed to friable asbestos on my job.

“2. I request a written statement (signed and dated) from the [employing establishment] acknowledging that I was exposed to friable asbestos.

“3. That in the future if I do develop an asbestos[-]related illness that:

a. All the right paperwork is in place.

b. The [employing establishment] will take responsibility for this illness or disease.”

In a decision dated December 3, 2003, the Office denied compensation on the grounds that appellant failed to establish an occupational exposure to asbestos or an injury resulting therefrom. The Office explained that exposure alone was not sufficient to establish a work-related medical condition entitling him to medical treatment under the Act.

On appeal appellant states: “I am not claiming a disease or illness at this time. I only want acknowledgment that I was exposed to friable asbestos on the job.”

² The record shows that appellant filed similar claims of asbestos exposure on March 9, 1989 and May 27, 1992.

LEGAL PRECEDENT

Section 8103(a) of the Act provide in pertinent part:

“The United States shall furnish to an employee *who is injured while in the performance of duty*, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.”³

Simple exposure to a workplace hazard, such as an infectious agent, does not constitute a work-related injury entitling an employee to medical treatment under the Act. The employer, therefore, should not use a Form CA-16 to authorize medical testing for an employee who has merely been exposed to a workplace hazard, unless the employee has sustained an identifiable injury or medical condition as a result of that exposure. The Office will authorize preventive treatment only under certain well-defined circumstances.⁴

ANALYSIS

On June 26, 2003 appellant claimed medical treatment, if needed and other benefits provided by the Act as a result of his stated exposure to friable asbestos in the workplace. A claimant seeking benefits under the Act has the burden of proof to establish the essential elements of his claim by the weight of the evidence,⁵ including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.⁶ Appellant has not met his burden of proof.

In his September 8, 2003 statement and argument on appeal, appellant concedes that he has no disease or illness and has sustained no injury in the performance of duty, at least not at this time. He wants only a signed and dated statement from the employing establishment acknowledging that he was exposed to friable asbestos, in the event he does develop an asbestos-related illness in the future and he wants a pulmonary test by the employing establishment. The Act cannot provide the relief he seeks where there is no identifiable injury or medical condition as a result of a workplace exposure.

³ 5 U.S.C. § 8103(a) (Emphasis added).

⁴ 20 C.F.R. § 10.303(a) (1999); *see id.*, § 10.313. Also *see* § 10.303(b); *see* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Authorizing Examination and Treatment*, Chapter 3.300.4.g (September 1995): The Act does not provide for routine examination of an employee who has been exposed to a coworker with an infectious disease or to hazards of the workplace. Unless there is reasonable proof that a disease or illness has been sustained by the employee, such examinations are the responsibility of the employing establishment.

⁵ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁶ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

In the case of *Alice J. Garfield*,⁷ the claimant filed a claim for exposure to asbestos in the performance of duty. She alleged that workers were doing asbestos work in the same suite and with the doors closed. In support of her claim, she submitted air sampling surveys showing the airborne concentrations of asbestos fibers on various floors, but she submitted no medical evidence showing that she had developed a diagnosable pulmonary condition. The claimant argued that the Office should pay for medical monitoring even though she had shown no symptoms of asbestos exposure. The Office denied her claim, finding that the claimant failed to submit any medical evidence establishing that she developed a medical condition as a result of her asbestos exposure. The Board affirmed, explaining that the Act does not provide for the payment of medical treatment following exposure to hazardous material or disease where an employee does not contract the disease to which he or she was exposed.

The Board makes the same finding in the present case. The federal workers' compensation statute does not provide for such testing or services in the absence of an identifiable injury or medical condition resulting from a workplace exposure.

CONCLUSION

The Board finds that appellant is not entitled to medical benefits under the Act, based on mere exposure to asbestos in the workplace.

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁷ 47 ECAB 645 (1996).