United States Department of Labor
Employees' Compensation Appeals Board

ROBERT W. NICHOLS, Appellant	)	
and	)	**Docket No. 03-11**
	)	**Issued: March 19, 2004**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Salem, VA, Employer	)	

Appearances:
Jeffrey P. Zeelander, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 19, 2002 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated February 16, 2001, which found that appellant's lung cancer was not causally related to factors of his federal employment. Since he filed his appeal within a year of the Office's February 16, 2001 merit decision, the Board has jurisdiction to review the merits of this claim.

ISSUE

The issue is whether appellant has established that his lung cancer is causally related to factors of his federal employment.

FACTUAL HISTORY

On July 6, 1998 appellant, then a 59-year-old plasterer, filed an occupational disease claim alleging that he worked around asbestos since 1985 and became aware that he sustained lung cancer from his employment on February 5, 1998. Appellant submitted three witness

statements from coworkers who stated there was asbestos in the workplace. In a statement dated November 1, 2001, Thomas A. Talbott, Jr. stated that he worked with appellant from 1985 to 1999. He stated that appellant was exposed to asbestos many times when they knocked down plastered ceilings, exposing the pipe insulation, which would fall from the pipes due to deterioration from age. Mr. Talbott stated that they would shovel it in a dump truck and haul it to the landfill, later to be buried. He stated that they also removed asbestos floor tile. Mr. Talbott stated that they constantly removed old, stained or broken ceiling tiles and often find fallen pipe insulation lying on the ceiling tiles. He stated that on one occasion appellant replaced almost all the ceiling tiles on Building 8 and that they did not have the proper masks or clothing to deal with the asbestos.

In an undated statement, James Sechur stated that he and appellant were exposed to asbestos pipe covering on numerous occasions while tearing out plastered ceilings and wall demolition in various buildings at the employing establishment. He stated that in Building 8, while replacing ceiling tile, pipe covering would be loose on top of ceiling tiles. Mr. Sechur stated that exposure on occasion he would have to remove his glasses to blow pipe insulation off of them. He noted that appellant was in the same vicinity on those occasions. In a statement dated November 3, 2001, Bill Woodfield indicated that, while working with appellant in Building 12, at the employing establishment, they made plaster repairs in various rooms. He stated that in one instance a hole in a pipe chase needed to be closed up and they noticed that the pipe insulation within the chase had been damaged. Mr. Woodfield stated that appellant suspected that the insulation contained asbestos and contacted the safety department to inspect the insulation before they continued with the plaster repair. He stated that the safety officer came to the room and sprayed the insulation with a material to keep any possible fibers from becoming airborne. Mr. Woodfield noted that he and appellant continued to complete the repairs to the pipe chase. They also transported a door which might have contained asbestos fibers.

In an undated statement received by the Office on July 12, 2000, appellant's supervisor, Robert Vest, and the safety manager, Roger Greenway, noted that surveys conducted as far back as 1983 identified thermal insulation was present throughout a large portion of the medical center. He stated that most areas were located in mechanical spaces, subbasements, pipe chases and above the ceiling protected for the most part or in isolated areas where it was unlikely to become disturbed. Mr. Greenway stated that the medical center had been in compliance and enforced the regulation and guidelines of the Environmental Protective Agency, Occupational Safety and Health Administration and the Veterans Administration, since the asbestos issue emerged and had a program and policy to direct the abatement of asbestos and repair and maintain areas containing asbestos material. He described the measures taken at the workplace to prevent harmful exposure to asbestos and stated that to their knowledge, appellant was not assigned to any tasks where any asbestos exposure was above ambient level. They also stated that there was no known evidence that appellant was ever exposed to asbestos at the facility.

In a request for medical clearance for respirator use questionnaire, Mr. Greenway stated that appellant might come into contact with asbestos occasionally as a mason "with limited exposure only." An asbestos inspection report from Seas, Inc., performed on May 8, 1998 was positive for asbestos in Building 18. In a report dated February 26, 1985, the Laboratory

Director, James A. Calpin, from the company Analytics, found amounts of asbestos in samples from sites at the employing establishment.

An x-ray performed on January 21, 1985 showed that appellant had mild dextro-scolosis of the thoracic spine and his lungs were clear of infiltration or congestive changes. An x-ray dated March 9, 1993 showed that appellant had slight scoliosis. A pulmonary function study dated July 8, 1993 showed that appellant had severe restrictive disease. An x-ray performed on January 16, 1998 showed a 3.5 x 3.5 cm. mass in the lingual on the left, but no pleural effusions.

In a report dated January 19, 1998, Dr. Bruce N. Stewart, a Board-certified internist, noted that appellant smoked at a rate of two packs a day and had a history of asbestos exposure many years prior. He stated that appellant had no prior history of asbestos injury. Dr. Stewart performed a physical examination and reviewed an x-ray performed that day showing a 3.5 x 3.5 centimeter mass in the left lingual. He reviewed a pulmonary function study performed the same day as his examination. Dr. Stewart diagnosed left lingual mass, probable carcinoma of the lung and mild restrictive defect on pulmonary function test. He stated that appellant likely had primary lung cancer.

In a report dated February 2, 1998, Dr. Edwin L. Williams, a Board-certified surgeon, noted that appellant smoked two packs of cigarettes a day, had a prior history of asbestos exposure and had no prior history of asbestos exposure. He performed a physical examination and reviewed an x-ray which showed a three to four centimeter mass that appeared to be in the lingual segment of the left upper lobe. Dr. Williams also reviewed a pulmonary function study. Further, he reviewed a computerized axial tomography (CAT) scan which showed no evidence of any major mediastinal adenopathy with a three by four centimeter regular tumor involving the lingual segment of the left upper lobe. Dr. Williams diagnosed left lingual mass and probable carcinoma of the lung. He also diagnosed mild restrictive defect on pulmonary function tests and history of asbestos exposure.

By decision dated February 16, 2001, the Office denied appellant's claim, finding that the evidence was insufficient to meet the guidelines for establishing that he sustained an injury on or about January 16, 1998. The Office found that appellant did not establish that an injury occurred at the time, place and in the manner alleged because his employer indicated that he was not assigned to any tasks where any asbestos exposure was above ambient levels.

By letter dated March 13, 2001, appellant requested an oral hearing before an Office hearing representative which was held on October 24, 2001. At the hearing, he testified that part of his job was tearing out plaster ceilings and that there was asbestos underneath them. Appellant stated that he saw the asbestos come down and "hit people in the face." He stated that anything wrapped in a band instead of stapled and glued was asbestos pipe covering in that time period. Appellant indicated that, when the employing establishment provided respirators, it was too late as workers were exposed during the 1980s and in 1995. He stated that they buried the "stuff" which included asbestos and plaster in the ground and were told not to let anyone see it. Appellant stated that he was exposed to asbestos in the basement despite management's assertion that he had no such exposure.

Appellant submitted additional medical reports. In a report dated January 7, 2000, Dr. Rajeev Sharma, a Board-certified internist, stated that he examined appellant for his annual physical examination. He noted that appellant had lung cancer diagnosed two years prior and underwent a pneumonectomy. Dr. Sharma stated that appellant complained of dyspnea and constant chest pain on the left side from his surgery, especially on movement. He noted that appellant had given up smoking. Dr. Sharma performed a physical examination. He concluded that appellant had lung cancer two years prior with no signs of recurrence, that he had a cough and shortness of breath and he had dyspnea and disability.

In another report dated January 7, 2000, Dr. Sharma summarized his findings on physical examination of appellant and noted that his chief complaint was dyspnea with minimal physical exertion. He did not expect any improvement and appellant was totally disabled.

In a report dated September 13, 2000, Dr. Stewart stated that he was treating appellant for fever and chills. He performed a physical examination and reviewed an x-ray performed on that day, which showed blunting of the right costophrenic angle where he had surgery. Dr. Stewart stated that appellant had a calcified pleural plaque on the right side which brought up the possibility of asbestos. He noted, however, that an x-ray from May 2000 did not show a calcified pleural plaque. Dr. Stewart stated that appellant had some cystic-like areas in the right upper lobe medially. He diagnosed "at least" acute bronchitis and "maybe even" bronchopneumonia.

In a report dated April 12, 2000, Dr. Sharma diagnosed nonsmall cell carcinoma of the lung, noted that appellant had a history of asbestos exposure and opined that the asbestos exposure contributed to the development of lung cancer. He stated that, while appellant had been a smoker, "it is well recognized that the combination of tobacco and asbestos increases the risk of nonsmall cell carcinoma of the lung several-fold." Dr. Sharma stated that appellant underwent a pneumonectomy which left him partially disabled with dyspnea on minimal exertion and fatigue.

By decision dated April 12, 2002, the Office hearing representative affirmed the Office's February 16, 2001 decision. The Office hearing representative found that appellant did not submit medical evidence which established that his disabling condition was causally related to his employment.

LEGAL PRECEDENT

To determine whether a federal employee has sustained an injury in the performance of duty, the Office must first determine whether a "fact of injury" has been established. First the, employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[1] Second, the employee must submit sufficient evidence, generally in the form of medical evidence, to establish that the employment incident caused a personal injury.[2]

[1] *Solomon Polen*, 51 ECAB 341, 343 (2000); *Michael E. Smith*, 50 ECAB 313, 315 (1999).

[2] *See Yvonne R. McGinnis*, 50 ECAB 272 (1999).

The medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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.[3]

ANALYSIS

In this case, the Office erred in finding in its February 16, 2001 decision that appellant did not establish that he had occupational exposure to asbestos at the time, place and in the manner alleged. The Office found that the fact of injury had not been established because the employing establishment contended that appellant was not exposed to any asbestos above ambient levels. However, the evidence of record establishes that appellant was exposed to asbestos in the workplace. The three witness statements, the results of the Seas, Inc. inspection on May 8, 1998, the results from Analytics dated February 26, 1985 and Mr. Greenway's statement of July 12, 2000 acknowledged that surveys conducted from 1983 revealed asbestos containing materials in the thermal insulation. He stated that the medical center was in compliance with the relevant regulations and appellant was not assigned to tasks where exposure was above the ambient level. However, any contribution of asbestos to appellant's lung cancer would entitle him to benefits.[4] The record establishes that appellant was exposed to asbestos while working for the employing establishment. The next question is whether the medical evidence is sufficient to establish that his lung condition was causally related to factors of employment.

The January 21, 1985 x-ray showed that appellant had mild dextro-scolosis of the thoracic spine and his lungs were clear of infiltration or congestive change. The March 9, 1993 x-ray showed that appellant had slight scoliosis. A July 8, 1993 pulmonary function study showed that appellant had severe restrictive disease. The January 16, 1998 x-ray showed a 3.5 x 3.5 centimeter mass in the lingual on the left, but no pleural effusions. No doctor's opinion of record, however, contains a rationalized medical opinion explaining how the results of these diagnostic tests or other diagnostic tests they reviewed related to appellant's employment-related asbestos exposure.

In a January 19, 1998 report, Dr. Stewart diagnosed left lingual mass, probable carcinoma of the lung and mild restrictive defect. He opined that appellant likely had primary lung cancer. Dr. Stewart did not explain how his diagnoses related to appellant's federal employment. His use of the word "likely" is speculative.[5] In a September 13, 2000 report, Dr. Stewart diagnosed acute bronchitis and possibly bronchopneumonia, but he did not relate these conditions to

[3] *Ern Reynolds*, 45 ECAB 690, 695 (1994); *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

[4] *See Arnold Gustafson*, 41 ECAB 131, 134 (1989).

[5] *See Thomas A. Faber*, 50 ECAB 566, 570 (1999); *William S. Wright*, 45 ECAB 498, 504 (1984).

appellant's employment exposure. Although he noted that a calcified pleural plaque on the right side suggested asbestosis, he also noted there was no calcified pleural plaque in the May 2000 x-ray and drew no conclusion whether or not appellant had asbestosis. The Board has held that a medical report not fortified by medical rationale is of diminished probative value.[6]

In a February 2, 1998 report, Dr. Williams diagnosed left lingular mass, probable carcinoma of the lung and mild restrictive defect based on the pulmonary function tests. He did not explain how the diagnosed conditions was caused or aggravated by any asbestos exposure in appellant's federal employment. Dr. Williams' diagnosis of "probable" carcinoma is speculative and he also did not describe the role, if any, of smoking in appellant's lung cancer. His report is of diminished probative value.

In a January 7, 2000 report, Dr. Sharma diagnosed history of lung cancer with no recurrence and dyspnea and disability. He did not explain how conditions related to appellant's federal employment. In an April 12, 2000 report, Dr. Sharma diagnosed nonsmall cell carcinoma of the lung. He considered that appellant had a history of asbestos exposure and opined that the asbestos exposure contributed to the development of lung cancer. Dr. Sharma noted that appellant had been a smoker and stated that "it is well recognized that the combination of tobacco and asbestos increases the risk of nonsmall cell carcinoma of the lung several-fold." He did not provide a fully rationalized medical opinion on causation. Dr. Sharma noted generally that the combination of tobacco and asbestos increases the risk of nonsmall cell carcinoma, but did not specifically address the risk in appellant's situation.[7] His opinion is insufficiently rationalized to establish that appellant's lung cancer was caused or aggravated by any employment exposure. Appellant has, therefore, failed to establish his claim.

CONCLUSION

The Office's decision is modified to find that appellant had asbestos exposure while working for the employing establishment. The Board finds that the medical evidence of record is insufficient to establish that appellant's lung cancer is causally related to his asbestos exposure or any other factor of his federal employment.

[6] *Annie L. Billingsley*, 50 ECAB 210 (1998).

[7] *See Durwood H. Nolin*, 46 ECAB 818, 821-22 (1995).

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2002 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: March 19, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member