



Safety and Health Association (OSHA) 1996.” Appellant asserted that his exposure to beryllium caused excessive rawness around the lungs and peeling of damaged tissue. He stated that he experienced warning signs on June 10, 1996 and first became aware of his condition on August 12, 1998. Appellant was last exposed to conditions alleged to have caused his condition on June 11, 1996 when he stopped work.

Mike Boston, a facilities management safety consultant of the employing establishment acknowledged in a letter that in or around April 1996, the sewer pump in building 41 failed, causing approximately six feet of sewage to overflow the pit and back up into the basement. He noted that in 1996 he was a branch analyst working in building 41 and one of his duties was to oversee the interests of the branch concerning building problems. Mr. Boston stated that, when the sewage overflowed in building 41, the basement was pumped out and General Services Administration (GSA) had the basement disinfected and the pump repaired. He further stated that no employees worked in the basement of the building and the door to the basement was locked and had an alarm.

Appellant submitted evidence in support of the claim, including a narrative statement and newspaper article which discussed the beryllium dust levels in his employing establishment. In a statement dated September 15, 2000, he indicated that he began working in building 41 sometime after January 1996 and began noticing breathing difficulties. Appellant stated that he worked the night shift and by early June his health began to deteriorate. He indicated that he suffered shortness of breath and general weakness. Appellant reiterated that he believed exposure to beryllium and the sewage problem in the basement of building 41 caused his condition and noted that he contacted OSHA about the problems.

In a medical report dated August 21, 2000, Dr. Said Mahmoud, a Board-certified internist, indicated that appellant presented in May 2000 with symptoms of bronchitis and again on August 9, 2000 with symptoms of soreness in the infrascapular areas between the shoulders, a boil on the right side of the back in the chest wall area and a raw feeling in his lungs. He stated:

“[Appellant] told me that back in 1995, when he was working for the IRS ... there was a sewage leak from the Allied Signal Plant which was nearby and there was beryllium pollution and exposure. He wrote to OSHA at that time and ... according to him ... beryllium was contaminating that complex of work environment. I did a pulse oximetry on room air and ambulation, which was 98 to 99 percent. There is no evidence of desaturation. I did pulmonary function tests [PFT], which revealed normal FEV-1 3.34 liters. The FEV-1 percent was 80.7 percent and the PVC was normal. This PFT is normal for his age and sex and height. However, I sent him for a CAT [computerized axial tomography] scan of the chest, which showed two 3 x 6-mm sized pulmonary nodules in the right lower lobe area of unknown significance. The rest of the CT [computerized tomography] scan of the chest is normal. There is no pleural thickening or parenchyma involvement. [Appellant] does not have much difficulty with his breathing -- [he] is deeply concerned about the beryllium exposure and his current symptoms. From a pulmonary point of view, I did not prove that there is any lung involvement simply because of a normal PFT, normal oximetry and normal CT scan of the chest.”

In a December 14, 2000 letter, the Office advised appellant that additional medical and factual information was needed in support of his claim. No further medical evidence was received.

By decision dated October 18, 2001, the Office denied the claim because the medical evidence did not provide a diagnosed medical condition in connection with the work exposure to beryllium.

On January 4, 2002 appellant requested reconsideration and submitted the report previously of record from Dr. Mahmoud dated August 21, 2000. Appellant further argued that the union had his former workplace tested, which revealed polychlorinated biphenyl (PCB) pollutants in the soil under building 41.

By merit decision dated February 28, 2002, the Office determined that the medical evidence submitted failed to provide a medical diagnosis associated with the claimed work exposure and was, therefore, insufficient to warrant modification of the prior decision.<sup>1</sup>

Appellant later requested reconsideration. The Office subsequently received an indoor air quality survey conducted January 7 to 24, 2002 and a laboratory analysis report dated March 19, 2002 summarizing results from lab samples collected from building 41 of the employing establishment. In a November 28, 2001 letter from Jeffrey Neely, a representative of GSA, it was noted that an indoor air quality investigation was undertaken following complaints from employees regarding safety and indoor quality problems in or around building 41. Mr. Neely reported that, based on their investigation building 41 was safe. The air quality report summarized that beryllium, volatile organics and mold spores levels were well below the required and recommended limits and that beryllium was not found in any surface sample.

By decision dated December 16, 2002, the Office denied appellant's claim. The Office found that there was no medical evidence of record based on objective findings and supported by medical rationale which established that appellant had a diagnosed medical condition that was caused or aggravated by a work exposure to beryllium.

In a letter dated December 21, 2002, appellant requested an oral hearing. A hearing was held on July 31, 2003 and he appeared on his own behalf. Appellant testified that his peeling lung condition was actually caused by a combination of factors; from PCB soil contamination, which he learned through newspaper articles covering contamination of the employing establishment and high levels of beryllium found in the plant next door to his office. He further testified that he was exposed to beryllium when the sewage leak was cleaned from the basement of his building. Appellant further testified that his lung condition developed over time; that between 1998 and 1999 he notice huge strips of lining material leaving his body and that Dr. Mahmoud felt that the condition could be related. He testified that Dr. Mahmoud's report of

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<sup>1</sup> The Office conducted a merit review of the case based on evidence submitted by appellant, including a lymphocyte transformation test dated January 24, 2001, medical progress reports from an unknown physician for the period May 23, 2000 through January 3, 2001 and the CAT scan dated August 11, 2000. The Board notes that this evidence is not of record.

record, which outlined test his results, was the best evidence he could provide in support of the claim.

By decision dated October 22, 2003, the Office hearing representative affirmed the prior decision finding that appellant failed to establish the first component of fact of injury. The Office hearing representative found that, while appellant maintained that his employment exposed him to beryllium in 1996 which caused excessive rawness of the lungs, he failed to provide evidence that the exposure occurred at the time, place and in the manner alleged. The Office hearing representative noted that the indoor air quality survey conducted January 7 to 24, 2002 failed to detect the presence of beryllium; specifically that the sampling and monitoring indicated that beryllium, volatile organic and mold spores levels were well below required and recommended levels and that beryllium was not detected in any surface sample. Additionally, the Office hearing representative found that the medical evidence failed to diagnose a condition related to the alleged workplace exposure. The Office hearing representative, therefore, found that appellant failed to establish fact of injury.

### **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his or 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 limitations 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.<sup>3</sup> 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.<sup>4</sup>

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident or exposure which is alleged to have occurred.<sup>5</sup> In order to meet his burden of proof to establish the fact that he sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he actually experienced the employment injury or exposure at the time, place and in the manner alleged.

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.<sup>6</sup> The evidence required to establish

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> *Daniel J. Overfield*, 42 ECAB 718 (1991).

<sup>5</sup> *See also* Federal (FECA) Procedure Manual, Part 2 -- *Claims, Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

<sup>6</sup> *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(a)(15), 10.5(a)(16) ("traumatic injury" and "occupational disease" defined).

causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.<sup>7</sup> The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.<sup>8</sup>

### ANALYSIS

In this case, the Office accepts that appellant worked in building 41 where sewage overflowed in the basement. The employing establishment confirmed that this event occurred and further indicated that, when the sewage overflowed the basement was pumped out and disinfected and the sewer pump was repaired. Appellant's claim, however, is based upon beryllium exposure. The Board finds, however, that he has failed to establish that he sustained an injury due to beryllium exposure at the time, place and in the manner alleged. Appellant initially noted in his claim that there was a beryllium problem due to dust from excessive goop dripping off the machines, he then related his beryllium exposure to the sewage problem in the basement of his building in statements of record and later indicated during the oral hearing that his condition was actually caused by a combination of factors, including PCB soil contamination and high levels of beryllium found in the plant next door to his office. He has, however, failed to submit any evidence of beryllium exposure. The evidence of record concerning beryllium testing at the employing establishment states the indoor air quality survey conducted January 7 to 24, 2002 failed to detect the presence of beryllium in any surface sample and found that beryllium, volatile organic and mold spores levels detected in the building were well below required and recommended levels. Appellant failed to submit official data or any other evidence of high levels of beryllium in the workplace during or after the sewage leak or as the result of any other air, soil or water exposure. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>9</sup>

While the evidence does establish that appellant worked in building 41 where sewage overflowed in the basement, the Board finds the medical evidence inadequate to support a finding that he sustained a diagnosed medical condition causally related to the sewage overflow. The alleged medical condition is claimed to be due to beryllium exposure, but appellant has not established any beryllium exposure. Dr. Mahmoud indicated in a report dated August 21, 2000, that he first saw appellant in May 2000 with symptoms of bronchitis and again on August 9, 2000 with symptoms of soreness in the infrascapular areas between the shoulders, a boil on the right side of the back in the chest wall area and a raw feeling in his lungs. The physician related that there was beryllium pollution and exposure after a sewage leak in building 41 and then he reviewed the results of the above tests, which he concluded yielded unremarkable results. Dr. Mahmoud only repeated the work conditions as reported by appellant. His report is of

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<sup>7</sup> *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

<sup>8</sup> *Charles E. Evans*, 48 ECAB 692 (1997).

<sup>9</sup> *Merton J. Sills*, 39 ECAB 572 (1988); *Vint Renfro*, 6 ECAB 477 (1954).

limited probative value because it is based on an inaccurate history of injury. Appellant has not established that he sustained beryllium exposure at work.

**CONCLUSION**

The Board finds that appellant has failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty.

**ORDER**

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

Issued: September 8, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member