United States Department of Labor
Employees' Compensation Appeals Board

GERALD B. WORKMAN, Appellant	)	
and	)	**Docket No. 04-33**
	)	**Issued: May 4, 2005**
DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, Grand Coulee, WA, Employer	)	

Appearances:
Brook L. Beesley, for the appellant
Thomas G. Giblin, Esq., for the Director

Oral Argument April 5, 2005

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 2, 2003 appellant filed a timely appeal of a July 14, 2003 decision of a hearing representative of the Office of Workers' Compensation Programs that found the medical evidence insufficient to prove a work-related pulmonary impairment entitling appellant to a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has an employment-related permanent impairment of the lungs.

FACTUAL HISTORY

On June 15, 2000 appellant, then a 45-year-old hydromechanic pipefitter, filed a claim for compensation for an occupational asbestos-related pleural disease that he attributed to his exposure to asbestos for many years. Appellant had worked in that position since January 1986,

and previously worked as a pipefitter helper and pipefitter at Puget Sound Naval Shipyard from October 1975 to September 1983.

Appellant submitted a January 5, 2000 report from Dr. John K. Naylor, who is Board-certified in pulmonary diseases, which was accompanied by results of pulmonary function testing done the same date. Dr. Naylor stated that this testing revealed a mild restriction in total lung capacity at 68 percent of predicted. A January 31, 2000 computerized tomography (CT) scan of appellant's chest showed normal lung parenchyma, and pleural plaques compatible with asbestos-related pleural disease. In a January 31, 2000 report, Dr. Naylor stated that the CT scan findings of pleural plaquing consistent with asbestos exposure may explain appellant's reduced total lung capacity. Also submitted were results of pulmonary function testing done on May 12, 1986, April 13, 1995, May 29, 1998 and June 16, 2000. In an August 31, 2000 report, Dr. Matthew C. Keifer, who is Board-certified in occupational medicine and preventive medicine, noted that appellant's results on pulmonary function testing were the same since 1986, and that the CT scan did not reveal significant interstitial parenchymal changes and did not explain his restrictive-appearing pulmonary functions. Dr. Keifer stated that a reduced lung capacity may be appellant's normal condition, given that a small percentage of the population had slightly reduced lung volume below 80 percent of predicted. Dr. Keifer concluded that appellant probably had work-related asbestos-related pleural disease, but that it was "not clear whether the patient has restrictive lung disease as a result of the asbestos." In a December 1, 2000 report Dr. Naylor diagnosed "asbestosis, or at least pulmonary restriction, secondary to pleural plaquing, probably from asbestos exposure."

On January 26, 2001 the Office referred appellant, prior medical reports, and a statement of accepted facts to Dr. Robert Stevens, who is Board-certified in pulmonary diseases, for a second opinion on his lung condition. In a February 27, 2001 report, accompanied by results of pulmonary function testing done the same day, Dr. Stevens stated that appellant had no physical findings such as crackles of interstitial disease, that the pulmonary function testing showed a very minimal restrictive defect very similar to that seen in 2000, and that these findings could not be attributed definitely to asbestos in the absence of interstitial changes on the CT scan. Dr. Stevens concluded that appellant had pleural thickening and plaques from his asbestos exposure, but that the pleural plaques, in and of themselves, were not associated with significant symptomatology or disability. An Office medical adviser reviewed the medical evidence on April 16, 2001 and stated that the minimal pleural plaques seen on the CT scan were not causing the mild restrictive defects on the pulmonary function testing, which were mildly ratable.

On April 26, 2001 the Office advised appellant that it had accepted that he sustained pleurisy without effusion or tuberculosis. On June 14, 2001 appellant filed a claim for a schedule award. In a June 11, 2001 report, accompanied by results of pulmonary function testing done that day, Dr. Naylor stated that a mild degree of pulmonary restriction persisted, probably on the basis of asbestos plaquing. In a December 7, 2001 report, accompanied by results of pulmonary function testing done that day, Dr. Naylor diagnosed mild restrictive disease, presumably related to asbestos plaquing without change. In a December 19, 2001 report, prepared in response to the Office's request to review Dr. Stevens' report, Dr. Naylor stated that he agreed with Dr. Stevens that appellant had no evidence of interstitial lung disease, that is, asbestosis, but that he had "a restriction in his total lung capacity which is without explanation other than some degree of constriction from his pleural plaquing."

On June 25, 2002 the Office referred appellant, the case record and a statement of accepted facts to Dr. Barry Marmorstein, who is Board-certified in pulmonary diseases, to resolve the conflict of medical opinion on whether he had a ratable lung impairment due to his exposure to asbestos. In an undated report received September 4, 2002, Dr. Marmorstein reviewed appellant's history and his prior medical reports, including the CT scan and the pulmonary function testing done on February 27 and June 11, 2001. Dr. Marmorstein stated that appellant's gastroesophageal reflux was "an obvious possible factor involved in his restrictive lung abnormality," and that his forced vital capacity in the range of 75 percent that had changed little since 1986 "would raise the possibility that he simply has congenitally small lungs, as was also mentioned in one of the reports." After noting the "unquestionable evidence that he has asbestos-related pleural disease" and the absence of definitive evidence of asbestos-related parenchymal disease, Dr. Marmorstein concluded:

> "He obviously has asbestos exposure and pleural plaquing secondary to that. However, that is not a ratable condition. He has mild reduction in vital capacity, apparently stable since 1986, and not definitely related to asbestos exposure. Therefore, as far as I can tell, he has no ratable asbestos[-]related lung disease at this time."

By decision dated September 20, 2002, the Office found that appellant was not entitled to a schedule award on the basis that his accepted pulmonary condition was not severe enough to be considered ratable. The Office found that appellant was entitled to medical benefits.

Appellant requested a hearing and submitted additional medical evidence. In a January 21, 2003 report, Dr. Naylor stated that congenitally small lungs was not a diagnosis he recognized, and concluded, "while the degree of pleural plaquing is not tremendously impressive from a radiographic standpoint, I have no other explanation to account for your reduction in total lung capacity. Therefore, I would agree with Dr. Stevens on a more probable than not basis that this is the cause of your reduction in total lung capacity." Also submitted were results of pulmonary function testing done on October 26, 1978, December 2, 1981, September 2, 1983 and October 1, 1985.

By decision dated July 14, 2003, an Office hearing representative found that the medical evidence was insufficient to prove appellant had a work-related pulmonary impairment entitling him to a schedule award.

LEGAL PRECEDENT

The schedule award provision of the Act[1] and its implementing regulation[2] sets forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. The regulations provide for a schedule award for a permanent impairment of the lungs.

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

The Board has held that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence, the opinion of such specialist, if sufficiently well rationalized and based on a proper medical background, must be given special weight.[3] The Board has also held that in a situation where the Office secures an opinion from an impartial medical specialist and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.[4]

ANALYSIS

The Board finds that the medical evidence establishes that appellant has pleural plaques as a result of his exposure to asbestos in his employment. There was no conflict on this diagnosis or its cause, agreed to by appellant's attending physicians, Drs. Naylor and Keifer, by the Office's referral physician, Dr. Stevens, and by the impartial medical specialist, Dr. Marmorstein.

There was a conflict of medical opinion, though, on the question of whether the pleural plaquing resulted in the mild restrictive defect, especially the reduced total lung capacity, seen on pulmonary function testing. Dr. Naylor, who is Board-certified in pulmonary diseases, concluded that appellant's mild restrictive disease was related to his pulmonary plaquing. Dr. Stevens, who is Board-certified in pulmonary diseases, concluded that the minimal restrictive defect on pulmonary function testing could not be attributed definitely to asbestos in the absence of interstitial changes on the CT scan.

To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,[5] referred appellant to Dr. Marmorstein, who is Board-certified in pulmonary diseases. While Dr. Marmorstein concluded that appellant's pleural plaquing was not a ratable condition and that his mild reduction in vital capacity was not definitely related to asbestos exposure, he did not address the reduction in total lung capacity, other than to speculate that appellant may have congenitally small lungs. His rationale for stating that appellant may have congenitally small lungs was that his forced vital capacity had not changed since 1986. However, by 1986 appellant had already been exposed to asbestos in federal employment for 11 years. Moreover, Dr. Marmorstein did not address whether the employment-related pleural plaquing contributed to appellant's restrictive lung disease, and therefore did not resolve the conflict of medical opinion. The case will be remanded to the Office for a clarifying opinion from Dr. Marmorstein addressing these points, after which the Office should issue an appropriate merit decision.

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[3] *James P. Roberts*, 31 ECAB 1010 (1980).

[4] *Harold Travis*, 30 ECAB 1071 (1979).

[5] 5 U.S.C. § 8123(a) states in pertinent part "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

CONCLUSION

The Board finds that the case must be remanded for the Office to obtain a clarifying opinion from the impartial medical specialist to resolve the conflict of medical opinion.

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Issued: May 4, 2005
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member