United States Department of Labor
Employees' Compensation Appeals Board

WALTER L. JORDAN, Appellant	)	
and	)	**Docket No. 05-1720**
	)	**Issued: November 15, 2005**
DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Long Beach, CA, Employer	)	

Appearances:
Walter L. Jordan, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 15, 2005 appellant filed a timely appeal of a July 12, 2005 decision by the Office of Workers' Compensation Programs, rescinding the acceptance of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to rescind its acceptance of appellant's claim.

FACTUAL HISTORY

On October 29, 2002 appellant, then a 48-year-old former sheet metal mechanic, filed an occupational disease claim alleging that he sustained asbestosis causally related to his federal employment. By letter dated November 10, 2002, the employing establishment controverted the claim due to the lack of medical evidence. By letter dated January 2, 2002, the Office requested that appellant submit further information.

The employing establishment submitted an unsigned report for estimated asbestos exposure for those in appellant's former position, *i.e.*, "allied trades." This study noted that starting in 1977, an employee in the allied trades would have had less than two fibers per millimeter level of exposure. The report also said that it was assumed that the employees were exposed "about half the time they worked in the machinery compartments on ship due to insulation ripout and installation. The average concentration in the space was much less than the maximum concentration near the insulator himself."

In a pulmonary function test conducted on January 15, 2003, Dr. Steven Leven, a Board-certified internist with a subspecialty in pulmonary disease, noted that appellant's spirometry and lung volumes revealed a moderate combined obstructive and restrictive ventilatory impairment with moderate improvement following bronchodilator. He opined that the obstruction was most likely related to appellant's cigarette smoking, but the restrictive impairment may be related to his asbestos exposure.

In a medical report dated January 26, 2003, Dr. Peter J. Leidl, a Board-certified internist, indicated that he was the primary care physician for appellant, who was exposed to asbestos while working for the employing establishment for nine years before the shipyard closed in 1995. He reported that appellant was a smoker being treated for hyperthyroidism. Dr. Leidl stated:

> "[Appellant's] pulmonary function tests on January 15, 2003 showed a combined obstructive and restrictive ventilatory impairment with moderate improvement following bronchodilators. The obstruction is related to [his] cigarette smoking. The restriction is consistent with appellant's asbestos exposure during his employment at the [employing establishment]."

By letter dated April 23, 2003, the Office referred appellant to Dr. Gary Gibbon, a physician Board-certified in allergy and immunology, for a medical examination. In a report dated May 22, 2003, he indicated that he interviewed, examined and tested appellant. Dr. Gibbon noted that appellant had "an [eight-]year history of mild asbestos exposure associated with mild interstitial pulmonary fibrosis on chest radiograph and moderately severe restrictive pulmonary abnormality on pulmonary function testing." He added that appellant had a history of tobacco exposure without significant airway obstruction. Dr. Gibbon indicated that, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, the degree of pulmonary impairment would be a class 4 which indicated a 51 to 100 percent impairment of the whole person. He opined that appellant's pulmonary impairment was consistent with the effects of asbestos exposure causing pulmonary asbestosis.

By letter dated June 25, 2003, the Office accepted appellant's claim for pulmonary asbestosis.

On July 21, 2003 appellant filed a claim for a schedule award for impairment to his lungs.

The Office referred appellant's case to Dr. Charles C. McDonald, a Board-certified internist with a subspecialty in pulmonary disease and Office medical consultant. In a report dated August 23, 2003, he stated:

> "In summary, Dr. Gibbon has opined that [appellant] has a class 4 [percent] impairment due to asbestos exposure. This was based on his history of exposure, complaints of shortness of breath on exertion and abnormal pulmonary function tests as well as the abnormal chest x-ray. However, [appellant's] first exposure was in 1980, with less than 2 fibers per [milliliter] level of exposure 50 [percent] of the time. This would not calculate to an approximate [eight] fiber year history of exposure to asbestos. This is not a level that is generally accepted to cause interstitial fibrosis due to asbestos exposure. Given that his respiratory symptoms started in the early 1990s, there would be an inadequate lag time from the time of first exposure to the development of his symptoms. Dr. Gibbon's conclusions, therefore, are not well rationalized. Unfortunately the pulmonary function test data supplied by [him] is illegible. The poorly photocopied flow volume loops do appear to be somewhat erratic."

Dr. McDonald recommended further evaluation and repeat testing. He also recommended that Dr. Gibbon be given an opportunity to respond to his comments.

The Office referred appellant to Dr. Gibbon for another examination. In a medical report dated September 2, 2003, he concurred with Dr. McDonald's opinion that appellant's history of asbestos exposure was less intense and of shorter duration than generally accepted to cause asbestosis. Dr. Gibbon noted that "objective testing is usually relied upon for confirming a diagnosis of asbestos-induced pleuroparenchymal disease." He noted that the initial tests, such as the chest radiograph and pulmonary function study, were both abnormal. However, Dr. Gibbon agreed that the pulmonary function test should be repeated and concurred with Dr. McDonald's suggestion to obtain a high resolution computed tomography (CT) scan of the lungs.

A high resolution CT scan of the lungs was performed on October 17, 2003. In a medical report dated December 2, 2003, Dr. Gibbon interpreted this report as excluding any pleuropulmonary asbestosis. He further explained;

> "[Appellant], a former steel metal worker, had negligible asbestos exposure history with associated symptoms and pulmonary function impairment that is out of proportion to the clinical history and physical findings.
>
> "This raised the suspicion of an underlying condition separate from the asbestos exposure and further testing has revealed that [appellant's] pulmonary impairment is due to emphysema and chronic healed calific granulomatous pulmonary disease."

On February 23, 2004 the Office issued a notice of proposed termination of all benefits as it noted that appellant did not have any medical condition causally related to his federal employment. In a letter dated July 13, 2004, he alleged that he was heavily exposed to asbestos.

In an August 10, 2004 decision, the Office determined that he did not sustain a medical condition causally related to asbestos exposure in his federal employment and denied all further benefits.

By letter dated August 28, 2004, appellant requested a hearing.

By decision dated May 2, 2005, the hearing representative vacated the August 10, 2004 decision. The hearing representative found that the Office erred when it issued a notice of proposed termination and then a final termination decision. The hearing representative indicated that the proper course of action would be to formally rescind acceptance of the claim.

On June 9, 2005 the Office issued a notice of proposed rescission on the basis that the medical evidence established that appellant never had an asbestos-related condition. By letter dated July 5, 2005, he noted his disagreement with the proposed decision and contended that the reports of Dr. Gibbon and Dr. McDonald were "brought into play to cause confusion and conflicts" and requested further testing. By decision dated July 12, 2005, the Office finalized the decision to rescind acceptance of the claim.

LEGAL PRECEDENT

Section 8128 of the Federal Employees' Compensation Act provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."[1] The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128 of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[2] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[3]

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of the rationale for rescission.[4]

ANALYSIS

The Office initially accepted appellant's claim for pulmonary asbestosis on June 25, 2003. At that time, there was medical evidence that he sustained asbestosis in his federal employment. Dr. Leven conducted a pulmonary function test on January 15, 2003 and

[1] 5 U.S.C. §§ 8101-8193, 8128.

[2] *John W. Graves*, 52 ECAB 160, 61 (2000).

[3] *See* 20 C.F.R. § 10.610.

[4] *John W. Graves*, *supra* note 2.

interpreted the results as evidencing an obstructive and restrictive ventilatory impairment. He opined that the obstruction was most likely related to appellant's cigarette smoking, but that the restrictive impairment may be related to asbestos exposure. After reviewing Dr. Leven's test, Dr. Leidl also noted that the restrictive impairment was consistent with asbestos exposure during appellant's federal employment. On May 22, 2003 Dr. Gibbon, an Office referral physician, indicated that appellant's pulmonary impairment was consistent with the effects of asbestos exposure causing pulmonary asbestosis.

Following the acceptance of the claim, further development of the medical evidence established that appellant did not have pulmonary asbestosis. Dr. McDonald, an Office referral physician, recommended further diagnostic testing. He indicated that appellant was not exposed to asbestos at a level generally accepted to cause interstitial fibrosis due to asbestos exposure. He also noted that there was an inadequate lag time from the time of first exposure to the development of his symptoms. The case was referred back to Dr. Gibbon, who agreed with Dr. McDonald that further testing was necessary. He agreed that appellant's history of asbestos exposure was less intense and of a shorter duration than that generally accepted to cause asbestosis. A CT scan of the lungs was obtained on October 17, 2003 and upon review of this test, Dr. Gibbon stated that this diagnostic test excluded appellant having pleuropulmonary asbestosis.

The Board finds that the Office's decision to rescind acceptance of appellant's claim was proper. Dr. Gibbon initially indicated that his pulmonary impairment was consistent with the effects of asbestos exposure causing pulmonary asbestosis Upon review of the additional diagnostic tests, he found that appellant never had asbestosis and that his pulmonary impairment was due to emphysema and chronic healed calific granulomatous pulmonary disease. The Board notes that, although Dr. Leidl, Dr. Leven and Dr. Gibbon all initially noted that the results of appellant's tests were consistent with asbestos exposure, the subsequent and more accurate CT scan determined that he did not, in fact, have asbestosis. Therefore, the medical evidence is sufficient to support the rescission of appellant's asbestosis claim.

Appellant objected to the fact that the Office referred him for further examination. Pursuant to the Office's regulations, an employee must submit to examination by a qualified physician as often and as such times and places as the Office considers reasonably necessary.[5] The Office sought to further develop appellant's claim in order to more carefully evaluate whether he had asbestosis and impairment from that condition. The Office did not abuse its discretion in developing the claim following the acceptance of pulmonary asbestosis.

CONCLUSION

The Board finds that the Office met its burden of proof to rescind its acceptance of appellant's claim.

[5] 20 C.F.R. § 10.320.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 12, 2005 is affirmed.

Issued: November 15, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board