United States Department of Labor
Employees' Compensation Appeals Board

C.B., Appellant	)	
and	)	**Docket No. 08-1495**
	)	**Issued: December 11, 2008**
DEPARTMENT OF THE ARMY, ANNISTON ARMY DEPOT, Aniston, AL, Employer	)	

Appearances:
Ray Vanschoubroek, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 28, 2008 appellant filed an application for review of the Office of Workers' Compensation Programs' February 12, 2008 decision denying her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that she sustained chronic obstructive pulmonary disease (COPD) in the performance of duty due to accepted workplace exposures.

FACTUAL HISTORY

On August 30, 2006 appellant, then a 48-year-old heavy mobile equipment repairer, filed an occupational disease claim (Form CA-2) asserting that she developed occupational asthma and COPD due to workplace exposures to dust and dirt. She stated that she first realized that her condition was causally related to her employment on May 2, 2006 while she was cleaning and stripping floors. In a statement dated August 28, 2006, appellant indicated that, on May 2, 2006,

she became severely congested and unable to breathe while sweeping and dusting at work, and she was eventually transported to an emergency room.

The record contains a May 2, 2006 report, bearing an illegible signature, from Alabama Emergency Medical Services. The report reflects that appellant was seen on that date for an asthma attack.

Appellant was treated by Dr. Donald Casey, a Board-certified osteopath, specializing in family medicine. In a May 16, 2006 report, Dr. Casey diagnosed occupational asthma and cervical facet syndrome. He opined that appellant was unable to work due to severe shortness of breath. Dr. Casey stated that he had reviewed a chest x-ray which was negative for COPD at that time. On July 14, 2006 he diagnosed occupational asthma and COPD.

In a decision dated February 7, 2007, the Office denied appellant's claim on the grounds that the medical evidence did not establish that the claimed medical conditions were causally related to the established work events.

In a report dated February 2, 2007, Dr. Casey stated that appellant had a long-standing history of asthma and COPD, which had been intermittent and mild in nature until her exposure to dust particles at work. He indicated that she had an onset of severe shortness of breath which required ambulance response and hospitalization. Dr. Casey opined that appellant's work episode and chronic disability were directly related to exposures at work.

On March 6, 2007 appellant requested a telephonic hearing, which was conducted on July 12, 2007. She testified that, prior to her work exposure to dust and dirt, she had a slight case of asthma, but did not suffer from COPD. Appellant stated that, after her work exposure, she was required to take medication for COPD.

Appellant submitted a report dated June 15, 2006 from Dr. Rohit Patel, a Board-certified internist, specializing in pulmonary diseases, who provided an interpretation of a complete pulmonary function study. Testing revealed normal FEV_1, FVC and mild reduction in FEV_1/FVC ratio, suggestive of mild obstructive lung disease with a 17 percent response to bronchodilators. Dr. Patel found mild increase in lung volume suggestive of hyperinflation.

By decision dated August 20, 2007, the Office hearing representative reversed the February 7, 2007 decision. He accepted that appellant experienced severe breathing problems on May 2, 2006 while cleaning the workplace, and that the medical evidence was sufficient to establish that appellant sustained an aggravation of occupational asthma. However, the hearing representative determined that the medical evidence was insufficient to establish that she had developed COPD, or any ongoing disability, as a result of occupational exposure. Finding that appellant had presented a *prima facie* case regarding COPD, he remanded the case for further development of the medical evidence, including a determination as to whether appellant's asthma aggravation was temporary or permanent, and whether appellant had developed work-related COPD. On August 24, 2007 the Office accepted appellant's claim for aggravation of asthma.

Appellant submitted additional reports from Dr. Casey. On July 14, 2006 Dr. Casey stated that appellant had occupational asthma and COPD. On October 23, 2006 he diagnosed

asthma, and depression/anxiety secondary to occupational asthma and COPD. On January 9, 2007 Dr. Casey diagnosed asthma, hypertension and chronic airway obstruction. In reports dated July 10 and September 20, 2007, he diagnosed COPD with occupational asthma and chronic bronchitis.

The Office referred appellant to Dr. Allan R. Goldstein, a Board-certified internist, specializing in pulmonary diseases, for a second opinion examination and an opinion as to whether appellant had COPD and, if so, whether or not it was work related. In a January 21, 2008 report, Dr. Goldstein related that appellant suffered an attack of wheezing and shortness of breath on May 2, 2006 while cleaning up at work. He noted that her shortness of breath persisted and was brought on by smoke, dust, perfumes and other fumes. Dr. Goldstein stated that complete pulmonary functions showed a moderate to severe obstructive defect, with significant improvement following bronchodilators. He opined that appellant had developed occupational asthma, which was directly related to the dust and fumes to which she was exposed on May 2, 2006. In a January 18, 2008 work capacity evaluation, Dr. Goldstein diagnosed work-related asthma, and indicated that appellant was unable to work in extreme temperatures or in areas with airborne particles, gas or fumes.

The Office asked Dr. Goldstein to clarify his January 21, 2008 report with respect to whether appellant had COPD. In a letter dated February 4, 2008, Dr. Goldstein stated: "Appellant does not have COPD. Her symptoms are all related to occupational asthma related to her job."

By decision dated February 12, 2008, the Office accepted appellant's claim for permanent aggravation of occupational asthma. It denied her claim for COPD, based upon Dr. Goldstein's second opinion report.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of 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 filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[2] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[3]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual statement identifying employment factors alleged to have caused or contributed to the presence

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989).

[3] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized 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 medial 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.[4]

Section 8123 of the Act provides that, 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.[5]

ANALYSIS

The Office accepted appellant's claim for permanent aggravation of occupational asthma. The underlying issue in this case is whether the claim should be expanded to include COPD. The Board finds that the case is not in posture for a decision due to a conflict in the medical evidence.

In a June 15, 2006 report, Dr. Patel provided an interpretation of a complete pulmonary function study, which revealed normal FEV_1, FVC and mild reduction in FEV_1/FVC ratio, suggestive of mild obstructive lung disease. Dr. Casey opined that appellant had COPD with occupational asthma, and chronic bronchitis. On February 2, 2007 he stated that appellant had a long-standing history of asthma and COPD, which had been intermittent and mild in nature until her exposure to dust particles at work. Dr. Casey opined that appellant's work episode and chronic disability were directly related to exposures at work.

The Office charged Dr. Goldstein, the second opinion examiner, with the task of determining whether appellant had COPD and, if so, whether or not it was work related. In his January 21, 2008 report, he opined that appellant had developed occupational asthma, which was directly related to the dust and fumes to which she was exposed on May 2, 2006. In a supplemental report dated February 4, 2008, Dr. Goldstein stated: "Appellant does not have COPD. Her symptoms are all related to occupational asthma related to her job."

The Board finds that there is a conflict in the medical opinion evidence between appellant's treating physicians and the Office's second opinion examiner. On the one hand, appellant's doctors opined that she suffered from the condition of COPD, which was exacerbated by exposure to dust and other substances at work. On the other hand, the physician for the

[4] *Solomon Polen*, 51 ECAB 341 (2000).

[5] 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

Office opined that appellant did not have COPD, and that her symptoms were related to occupational asthma. Where there is a conflict of medical opinion between a physician making an examination for the government and the employee's physician, the Office must appoint a third physician to conduct an impartial medical examination to resolve the conflict.[6] The case must be remanded to the Office for further development in order to resolve the conflict. On remand, the Office will refer appellant, the medical record and a statement of accepted facts, to an appropriate Board-certified specialist, to obtain a rationalized opinion as to whether appellant has COPD and, if so, whether there is a causal relationship between the condition and occupational exposures. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

CONCLUSION

The Board finds that the case is not in posture for a decision due to a conflict in the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the February 12, 2008 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further development consistent with this decision.

Issued: December 11, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[6] 5 U.S.C. § 8123(a).