United States Department of Labor
Employees' Compensation Appeals Board

R.K., Appellant	)	
and	)	**Docket No. 09-998**
	)	**Issued: January 8, 2010**
TENNESSEE VALLEY AUTHORITY, JOHNSONVILLE FOSSIL PLANT, Chattanooga, TN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 6, 2009 appellant filed a timely appeal from the January 14, 2009 merit decision of the Office of Workers' Compensation Programs denying his occupational disease claim and from a February 9, 2009 decision denying his request for reconsideration of the merits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained adenocarcinoma causally related to factors of his federal employment; and (2) whether the Office properly denied appellant's request for reconsideration of the merits of the case pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant contends that his employment contributed to his carcinoma.

FACTUAL HISTORY

On November 20, 2008 appellant, then a 67-year-old retired pipefitter welder, filed an occupational disease claim alleging adenocarcinoma in the ampulla of Vater as a result of his federal employment. He noted that he had memory loss caused by the cancer but, "My memory finally came back and made me realize this cancer was probably caused by my employment." Appellant listed the date of injury as January 5, 1996 and the date he first realized a relationship to his employment as January 1, 2008. The employing establishment listed his last exposure date as July 14, 1978. By letter dated January 2, 2009, the employing establishment controverted the claim.

In a surgical pathology report dated January 12, 1996, Dr. Christopher Mixon, a Board-certified family practitioner, diagnosed ampulla of Vater, biopsy, adenocarcinoma, well-differentiated, invasive and arising within severe dysplasia.

In a December 15, 1995 report, Dr. George D. Wright, a Board-certified family practitioner, assessed appellant with a few small erosions seen at the gastroeunostomy orifice, simple lower esophageal erosion, possibly abnormal ampulla ofacer and biopsies pending. He also noted that none of the abnormalities provide a satisfying explanation of recent gross malena and hematochezia and wondered about the possibility of a colic lesion.

In a note dated February 28, 1996, Dr. Patrick A. Brighton, a Board-certified surgeon, noted that appellant had biopsy proven adenocarcinoma of the ampulla of Vater. He performed an exploratory laprotomy, pancreatic duodenectomy, spelectomy and pancreatic exclusion. Dr. Brighton listed his final diagnoses as ampullary cancer and idiopathy thrombocytopenia purpura (ITP). The surgery pathology report found differentiated adenocarcinoma involving the duodenal mucosa and ampulla of Vater, covering a maximum region of approximately five millimeters (mm) diameter. It invades into the muscularis mucosa but no invasion below the pancreatic duct or of the common bile duct was identified. The duodenal mucosa immediately adjacent to the carcinoma showed severe dysplasia, extending from up to one to two mm from the carcinoma.

In a November 22, 1996 report, Dr. Robert M. Johnson, a Board-certified family practitioner, noted that he could not provide any opinion as an expert, but stated that there was no question that some of the chemicals appellant handled in the past had the potential for causing harm, even cancer. He noted the principal culprits were by-products of burning coal, xylene, coal tar, sulphur dioxide, benzene, hydrocarbon fuels, paint, asbestos, carbon tetrachloride, uranium and formaldehyde. Dr. Johnson then noted that none of these had a causal relationship with ITP, although benzene is a potent marrow toxin. He noted that the problem with ITP is immunologic and not a production or marrow problem.

On December 12, 1996 Dr. Brighton performed an exploratory laparaotomy, pancreactico duodenectomy, splenoectomy and pancreastic exclusion. His postoperative diagnoses were ampullary cancer and ITP.[1]

In an April 25, 2000 report, Dr. Sally J. Killian, a Board-certified internist, summarized appellant's medical history. She noted that he had been treated for chronic back pain from 1978 as a result of a work-related injury for which he was found disabled. Appellant still experienced chronic back pain and was chronically dependent on narcotic medications. In 1995, he was diagnosed with ITP and had a subsequent splenectomy. Dr. Killian also noted a history of rheumatoid arthritis and a remote history of peptic ulcer disease and is status post plyloroplasty, vagotomy and Billroth 2 procedure. Appellant also had gastroesophageal reflux with a history of cancer of the ampulla of Vater, diagnoses in 1996. He underwent a modified Whipple procedure performed by Dr. Brighton, from which he had remained free of recurrent disease. Dr. Killian listed a history of hypothyroidism and asbestosis as well as bilateral hearing loss and chronic depression and was post cholecystectomy. She noted that appellant recently had been complaining of respiratory infections.

In a January 10, 2002 report, Dr. Johnson noted that appellant asked him to comment on the possible relationship between asbestosis and carcinoma of the ampulla of Vater. He noted that there was general agreement that long-term asbestos exposure predisposes one to gastrointestinal tract malignancies. Dr. Johnson noted that appellant's diagnosis of pulmonary asbestos was not established until 1999. At the time of the diagnosis and surgical treatment of appellant's ampullary carcinoma in 1996, it was known that he had been exposed to asbestos but it was not known that he had asbestosis.

In an October 30, 2008 note, appellant contended that his carcinoma was related to his employment because he was exposed to many different chemicals, including carbon tetrachloride and asbestos.

In a report dated November 25, 2008, Dr. Kerry W. Ross, a Board-certified internist, indicated that appellant's ProAir inhaler was related to a separate claim regarding asbestosis and should be covered.

In a December 1, 2008 statement, appellant reiterated his cancer of the ampulla of Vater was related to his work as an apprentice, journeyman pipefitter, welder, foreman and supervisor. During his employment much of what he breathed had the potential to cause his type of cancer. Appellant also submitted internet articles with regard to cancer and asbestos.

[1] The surgical pathology report from the operation of February 12, 1996 showed pancreas, duodenum and distal common bile duct (pancreatico duodenectomy/Whipple's Procured): Approximately 5 mm maximum diameter moderately differentiated adenocarcinoma involving duodenal mucoa an ampulla of Vater with: (a) invasion into the muscularis mucosa; no deeper invasion identified; severe dysplasia or ampullary mucosa and periampulary duodena mucosa immediately adjacent to tumor; bile duct margin, pancreatic margins, duodenal and gastric margin all negative for neoplasia; minimal nonspecific duodenitis and mild nonspecific chronic gastritis (nonatrophic). Dr. Brighton also noted spleen, splenectomy -- 259 gram spleen with two small syalinized and calcified odules compatible with remote granulomas and no other histological abnormalities.

By decision dated January 14, 2009, the Office denied appellant's claim, finding that the medical evidence was not sufficient to establish his cancer as causally related to factors of his federal employment.

By letter dated January 21, 2009, appellant requested reconsideration. He discussed a study on poisons and pollutants taken by and for the city of Bloomington, Indiana and the effects of various pollutants, including carbon monoxide, lead, nitrogen dioxide, sulfur dioxide, benzene and formaldehyde.

By decision dated February 9, 2009, the Office denied appellant's request for reconsideration. It found that he did not submit relevant argument or new medical evidence with his request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[3] including that he is an "employee" within the meaning of the Act[4] and that he filed his claim within the applicable time limitation.[5] The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.[6] 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.[7]

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[8]

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[2] 5 U.S.C. §§ 8101-8193.

[3] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[4] *See M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

[5] *R.C.*, 59 ECAB ___ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

[6] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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

[8] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

Causal relationship is a medical issue[9] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,[10] must be one of reasonable medical certainty[11] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[12]

ANALYSIS -- ISSUE 1

The Board finds that appellant failed to establish a causal relationship between his exposure to various chemicals during his federal employment and his adenocarcinoma in the ampulla of Vater.

The medical evidence of record is not sufficient to establish that appellant's cancer is causally related to factors of his federal employment. In a November 25, 2008 report, Dr. Ross discussed appellant's medications in other claims. Accordingly, this report is irrelevant to the current claim for adenocarcinoma in the ampulla of Vater. Drs. Mixon, Wright, Killian and Brighton discussed appellant's medical conditions but did not address any causal connection to his employment. Dr. Johnson opined on November 22, 1996 that some of the chemicals appellant handled in the past had the potential for causing harm, even cancer. He mentioned burning coal, xylene, coal tar, sulphur dioxide, benzene, hydrocarbon fuels, paint, asbestos, carbon tetrachloride, uranium and formaldehyde. However, Dr. Johnson's opinion is speculative as he merely noted that the chemicals had the potential to cause cancer. Furthermore, he noted that none of these chemicals had a causal relationship with ITP, noting that, although benzene was a potent marrow toxin, it was immunologic and not a production or marrow problem. Dr. Johnson's January 10, 2002 opinion also lacks the specificity necessary to establish that appellant's carcinoma of the ampulla of Vater as causally related to his employment. He never discussed appellant's employment in this brief note or whether the specific exposures alleged by appellant caused his carcinoma; he merely discusses the potential relationship between asbestosis and gastrointestinal malignancies.

With regard to the remaining evidence, the Board notes that Kerry Sturgis is not a medical physician but rather an industrial hygienist. Accordingly, Ms. Sturgis' report cannot establish a medical correlation between appellant's employment and his carcinoma.[13] Appellant's contentions as to why he believes his condition is employment related are not sufficient to establish a causal relationship. The Board has held that laypersons are not

[9] *Mary J. Briggs*, 37 ECAB 578 (1986).

[10] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[11] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[12] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[13] *See* 5 U.S.C. § 8101(2) for the definition of "physician."

competent to render medical opinion.[14] Finally, with regard to the material submitted from the Internet, the Board has held that newspaper clippings, medical text and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and an employee's federal employment. Such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee.[15]

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that the condition was caused by his employment is sufficient to establish causal relationship.[16] The Board has held that the fact that a condition manifests itself or worsens during a period of employment[17] or that the work activities produce symptoms revelatory of an underlying condition[18] does not raise an inference of causal relationship between the two. Appellant failed to provide medical evidence establishing the causal relationship between his factors of employment and a medical condition. The Office properly denied his claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[19] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[20] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[21] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[22]

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[14] *James A. Long*, 40 ECAB 538, 542 (1989).

[15] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[16] *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

[17] *E.A.*, 58 ECAB 677, (2007); *Albert C. Haygard*, 11 ECAB 393, 395 (1960).

[18] *D.E.*, 58 ECAB 448, (2007); *Fabian Nelson*, 12 ECAB 155, 157 (1960).

[19] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[20] 20 C.F.R. § 10.606(b)(2).

[21] *Id*. at § 10.607(a).

[22] *Id*. at § 10.608(b).

ANALYSIS -- ISSUE 2

The Office denied appellant's claim as he failed to submit sufficient medical evidence to establish a causal relationship between his adeoncarcinoma in the ampulla of Vater and factors of his federal employment. Appellant did not meet any of the criteria in his request for reconsideration for the Office to conduct a merit review of his claim. He did not submit any new evidence in support of his claim. Nor did appellant advance or show that the Office improperly interpreted a specific point of law or advanced a relevant legal argument not previously considered.

Appellant's arguments on reconsideration do not warrant merit review. His discussion of a study with regard to pollutants in Bloomington, Indiana is irrelevant, to the underlying medical cause in his case. As noted above, general articles in the newspaper and internet are of general application and are not determinative of a claimant's entitlement to benefits under the Act.[23] Consequently, appellant has not established that he is entitled to review of the merits of his claim.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained adenocarcinoma in the ampulla of Vater causally related to factors of his federal employment. The Board further finds that the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

[23] *Joe T. Williams, supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 9 and January 14, 2009 are affirmed.

Issued: January 8, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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