United States Department of Labor
Employees' Compensation Appeals Board

B.A., Appellant	)	
	)	
and	)	**Docket No. 11-1160**
	)	**Issued: January 4, 2012**
DEPARTMENT OF THE ARMY, ARMY CORPS OF ENGINEERS, Old Hickory, TN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 13, 2011 appellant filed a timely appeal from December 29, 2010, February 10, 2011 and March 31, 2011 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an occupational disease in the performance of duty.

FACTUAL HISTORY

On February 18, 2010 appellant, then a 60-year-old lock and dam equipment mechanic, filed an occupational disease claim alleging that he sustained chronic obstructive pulmonary

[1] 5 U.S.C. § 8101 *et seq.*

disease as a result of inhaling concrete dust and fumes from welding, painting, cutting and burning in a closed environment for over 22 years. He became aware of his condition on July 6, 2007 and realized its connection to his federal employment on January 26, 2010. Appellant did not incur lost time from work.[2]

In a March 20, 2007 medical note, Dr. Charlotte J. Lohrey, a Board-certified internist, related that appellant had uncontrollable coughing as well as a history of smoking. On examination she observed diminished breath sounds and scattered wheezes. Dr. Lohrey diagnosed acute bronchitis and tobacco use disorder. She later diagnosed chronic obstructive pulmonary disease in a July 6, 2007 progress note. Additional records from Dr. Lohrey for the period March 30, 2007 to September 10, 2009 documented appellant's ongoing tobacco use.

An April 28, 2010 statement of accepted facts detailed that appellant worked for the employing establishment since 1987 and first experienced lung problems during a maintenance project in March 2007. During this project, he and other employees used wire saws to cut concrete, which generated large amounts of dust. In addition, appellant performed welding and other steel fabrication duties for approximately 20 years. Safety equipment, including dust masks and respirators, was available.

A June 18, 2010 chest x-ray report from Dr. Daniel A. Grippo, a Board-certified diagnostic radiologist, exhibited thickening of the tracheoesophageal stripe. He pointed out that appellant was exposed to asbestos.

Appellant was referred for a second opinion examination to Dr. Mohamed M. Toban, a Board-certified internist and pulmonologist. In a June 23, 2010 report, Dr. Toban reviewed the statement of accepted facts and noted that appellant experienced coughing, wheezing, dyspnea and discomfort approximately eight years earlier following an eight-week period of cutting concrete at work. He was subsequently diagnosed with acute asthmatic bronchitis and prescribed antibiotic medications and an inhaler, both of which effectively controlled his symptoms. Dr. Toban also remarked that appellant smoked since the age of 17. On examination, he observed a slight reduction of bilateral breath sounds. A chest x-ray did not reveal an active parenchymal infiltrate while pulmonary function studies confirmed minimal expiratory flow obstruction. Dr. Toban opined:

> "The incident described while [appellant] was cutting concrete is not clear as to whether it was at that time related to an acute infectious process where [he] could have been exposed…. The contribution of his work as a concrete cutter to his current symptoms or in a bigger picture, the contribution of his welding job for many years is small, if at all any, where the current pulmonary function shows minimal airway disease."

In a letter dated June 26, 2010, appellant asserted that he was treated with "contempt and racial disregard" by Dr. Toban and his staff. He specified that a nurse unfairly manipulated a

[2] The medical evidence further indicates that appellant developed adult-onset diabetes, hyperglycemia, hypertension, vitamin D deficiency, diverticulosis and tinea pedis, *inter alia*, as well as injured his left knee. These conditions are not presently before the Board.

spirometric test and that he was left in an examination room for about two hours while other patients were seen. Appellant added that Dr. Toban was biased against workers' compensation claimants.

Dr. Toban advised in a November 1, 2010 addendum that appellant's chest x-ray showed that the mediastinal structures and cardiac shadow were within normal limits. A September 23, 2010 spirometric report from Dr. Jonathan G. Evans, a Board-certified internist and pulmonologist, demonstrated normal vital capacity notwithstanding mildly-obstructed expiratory flow and moderately-restricted inspiratory effort.

On November 26, 2010 OWCP's medical adviser determined that Dr. Toban's statement that the causal relationship between appellant's federal employment and his pulmonary condition was "small, if at all any" was ambiguous.

OWCP informed Dr. Toban in a December 3, 2010 letter that additional information was needed to clarify his opinion on cause of injury. In a December 14, 2010 supplemental report, Dr. Toban explained that appellant's chronic obstructive pulmonary disease was "an acute episode without permanent sequela or permanent damage to his lungs." Because the condition was "more of a simple encounter that seemed to have resolve[d]," he concluded that it was unrelated to occupational exposure and more likely due to appellant's smoking history.

On December 22, 2010 OWCP's medical adviser reviewed Dr. Toban's supplemental report and agreed that appellant's job did not cause or contribute to his pulmonary condition.

By decision dated December 29, 2010, OWCP denied appellant's claim, finding that Dr. Toban's opinion constituted the weight of the medical evidence.

Appellant requested reconsideration on January 4, 2011, arguing that industrial exposure to asbestos and concrete dust contributed to his chronic obstructive pulmonary disease. He submitted a June 17, 2010 spirometric evaluation form signed by Dr. Toban, a copy of Dr. Grippo's June 18, 2010 x-ray report and a printout of an Internet article on the subject of asbestos exposure and chronic obstructive pulmonary disease.

On February 10, 2011 OWCP denied modification of the December 29, 2010 decision.

Appellant requested reconsideration on February 22, 2011. He furnished another copy of Dr. Grippo's June 18, 2010 x-ray report.[3]

On March 31, 2011 OWCP denied modification of the February 10, 2011 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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

[3] Appellant cited various state court cases for the proposition that a respiratory condition may be causally related to both asbestos exposure and smoking.

States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period, that an injury was sustained in the performance of duty as alleged and that any disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.[4] 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.[5]

Whether an employee actually sustained an injury in the performance of duty begins with an analysis of whether fact of injury has been established.[6] To establish fact of injury in an occupational disease claim, 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.[7]

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's 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, must be one of reasonable medical 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.[8]

ANALYSIS

The case record supports that appellant inhaled asbestos fibers, concrete dust and fumes on the job for over 22 years.[9] The medical evidence also establishes that he was diagnosed with chronic obstructive pulmonary disease. Appellant was referred for a second opinion examination to Dr. Toban, who concluded that his chronic obstructive pulmonary disease was not causally related to his federal employment. Subsequently, OWCP denied the claim.

The Board finds that Dr. Toban's opinion constitutes the weight of the medical evidence. The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in

[4] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[6] *See S.P.*, 59 ECAB 184, 188 (2007).

[7] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *R.R.*, Docket No. 08-2010 (issued April 3, 2009).

[8] *I.J.*, 59 ECAB 408 (2008); *Woodhams*, *supra* note 5.

[9] The Board notes that appellant initially filed for chronic obstructive pulmonary disease due to inhalation of concrete dust and fumes. However, the evidence of record indicates that he amplified and expanded his claim to include exposure to asbestos. *See Wilfred M. Hamilton*, 41 ECAB 524 (1990).

support of the physician's opinion.[10] In June 23 and November 1, 2010 reports, Dr. Toban reviewed the statement of accepted facts, obtained appellant's health history, performed a comprehensive physical examination and assessed radiological and spirometric results. As a result of these findings, he opined that the causal relationship between appellant's federal employment and his pulmonary condition was "small, if at all any." Recognizing the ambiguous nature of this opinion, OWCP properly requested that Dr. Toban clarify the cause of appellant's condition. Dr. Toban thereafter clarified in a December 14, 2010 report that appellant's chronic obstructive pulmonary disease was not causally related to occupational exposure, explaining that the condition appeared to be an acute episode that resolved without permanent lung damage and was more likely due to cigarette smoking.

The remaining medical evidence of record is of limited probative value and does not establish that appellant's exposure to asbestos fibers, concrete dust and fumes caused or contributed to his chronic obstructive pulmonary disease. Dr. Lohrey's records for the period March 20, 2007 to September 10, 2009, Dr. Grippo's June 18, 2010 chest x-ray report and a June 17, 2010 spirometric evaluation form signed by Dr. Toban offered limited probative value on the issue of causal relationship as none addressed whether appellant's federal employment caused an injury.[11] Finally, a printout of an Internet article attributing chronic obstructive pulmonary disease to asbestos exposure lacked evidentiary value. The Board has held that articles from an Internet website are of general application and not determinative regarding whether specific conditions are causally related to the particular employment factors in a claim.[12]

Appellant contends on appeal that a combination of asbestos fibers, airborne toxins and cigarette smoke can trigger chronic obstructive pulmonary disease. A medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician.[13] An award of compensation may not be based on an employee's belief of causal relationship.[14] As noted, the medical evidence did not sufficiently establish that appellant's condition resulted from industrial exposure to asbestos fibers, concrete dust and fumes.

The Board points out that appellant submitted new evidence after issuance of the March 31, 2011 decision. The Board lacks jurisdiction to review evidence for the first time on appeal.[15] However, appellant may submit new evidence or argument as part of a formal written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

[10] *James Mack*, 43 ECAB 321, 329 (1991); *I.R.*, Docket No. 09-1229 (issued February 24, 2010).

[11] *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[12] *B.C.*, Docket No. 10-691 (issued October 19, 2010). *See also Robert S. Winchester*, 54 ECAB 191 (2002).

[13] *See Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949).

[14] *P.K.*, Docket No. 08-2551 (issued June 2, 2009).

[15] 20 C.F.R. § 501.2(c).

CONCLUSION

The Board finds that appellant did not establish that he sustained an occupational disease in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the March 31 and February 10, 2011 and December 29, 2010, decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 4, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board