# United States Department of Labor
# Employees' Compensation Appeals Board

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| **G.T., Appellant** | ) | |
| **and** | ) | **Docket No. 13-895** |
| | ) | **Issued: August 26, 2013** |
| **DEPARTMENT OF THE ARMY,** | ) | |
| **Fort Carson, CO, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On March 5, 2013 appellant, through his attorney, filed a timely appeal of a February 4, 2013 merit decision 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 while in the performance of duty.

### ***FACTUAL HISTORY***

On March 1, 2010 appellant, then a 68-year-old retired floor layer, filed an occupational disease claim alleging that he was exposed to asbestos while removing, repairing, replacing and tearing down tiles, flooring, walls and ceilings from 1970 to 1975. He also used products

[1] 5 U.S.C. § 8101 *et seq.*

containing asbestos, such as joint and finishing compounds, paint, patching plaster and adhesives.[2] An April 16, 2009 chest x-ray obtained by Dr. Donald A. Breyer, a Board-certified diagnostic radiologist, exhibited primary "s" and secondary "t" opacities in the middle and lower lung fields with a profusion of 1/0. Dr. Breyer diagnosed bilateral interstitial fibrosis consistent with asbestosis.

Dr. Roy P. Johnson, a Board-certified occupational physician, related in an October 26, 2009 report that appellant was exposed to asbestos at work while laying floor tiles and repairing pipes from 1970 to 1975. Appellant did not wear a mask or any other protective equipment. Following pulmonary function testing and a review of the April 16, 2009 chest x-ray, Dr. Johnson opined that appellant sustained asbestosis with a latency period of approximately 30 years.

OWCP referred appellant for a second opinion examination to Dr. Lawrence H. Repsher, a Board-certified internist. In a March 10, 2011 report, Dr. Repsher reiterated appellant's former job duties. On physical examination, he observed bilateral lower extremity thrombophlebitis with brawny edema. Dr. Repsher pointed out that the April 16, 2009 chest x-ray did not reveal any calcified pleural plaques, which "generally precede the onset of visible interstitial fibrosis." In a May 12, 2011 supplemental report, he stated that an April 22, 2011 chest x-ray was unremarkable. In the absence of radiographic evidence to the contrary, Dr. Repsher concluded that appellant did not sustain an industrial-related pulmonary disorder.

By decision dated May 20, 2011, OWCP denied appellant's claim, finding that the weight of the medical evidence did not establish that his occupational asbestos exposure resulted in a pulmonary condition. On February 23, 2012 OWCP's hearing representative found a conflict in medical opinion existed between Dr. Johnson and Dr. Repsher on the issue of causal relationship. The case was remanded for a referee examination.

Dr. Jeffrey S. Schwartz, a Board-certified internist, was selected as the impartial medical specialist. In a May 25, 2012 report, based on a May 18, 2012 physical examination, he reviewed the medical file and the February 2, 2011 statement of accepted facts. A high-resolution computerized tomography (CT) scan of the chest, which he stated to be "more sensitive in picking up pleural and parenchymal/interstitial lung disease," exhibited right pulmonary nodule, questionable pancreatic mass and coronary atherosclerosis, but did not show evidence of interstitial lung disease or pleural abnormalities. In addition, physical examination and a spirometry study were normal. Dr. Schwartz found that, while appellant may have had significant exposure to asbestos products, he had no radiographic evidence of asbestos disease. He noted that, although Dr. Breyer interpreted an April 16, 2009 x-ray as showing evidence of interstitial lung disease consistent with asbestosis, the changes were deemed very mild. Dr. Schwartz explained that, in retrospect, Dr. Breyer's interpretation was in error as the high-resolution CT scan did not show evidence of interstitial lung disease. Based on these findings, he opined that appellant did not sustain industrial-related asbestosis.

[2] Facts were incorporated into a statement of accepted facts dated February 2, 2011.

By decision dated July 9, 2012, OWCP denied appellant's claim, finding that the weight of the medical evidence did not establish that his occupational asbestos exposure caused or contributed to a pulmonary disorder.

Counsel requested a telephonic hearing, which was held on November 13, 2012. Appellant testified that he was exposed to asbestos fibers at work for seven years.

A December 4, 2012 chest x-ray obtained by Dr. Fred J. Bertoldo, a Board-certified diagnostic radiologist, showed mild atelectasis of the right lung base and diminished lung volumes. A December 6, 2012 report from Dr. Craig S. Shapiro, a Board-certified internist, noted unremarkable physical examination findings.[3]

On February 4, 2013 OWCP's hearing representative affirmed the July 9, 2012 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 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]

Rationalized medical opinion evidence is generally required to establish causal relationship. 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

[3] Appellant also submitted a November 16, 2012 letter from the Colorado Medical Board acknowledging receipt of his complaint against Dr. Schwartz pertaining to the physician's conduct during the referee examination and the validity of the May 25, 2012 report. The case record does not contain any further information regarding the disposition of this complaint.

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

rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[8]

If there is a conflict in medical opinion between the employee's physician and the physician making the examination for the United States, OWCP shall appoint a third physician, known as a referee physician or impartial medical specialist, to make what is called a referee examination.[9] Where OWCP has referred appellant to a referee physician to resolve a conflict, the referee's opinion, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[10]

## ***ANALYSIS***

OWCP accepted that appellant was exposed to asbestos while he was a federal employee. After a hearing representative determined that a conflict in medical opinion existed as to whether this exposure caused or contributed to asbestosis or another asbestos-related respiratory illness, the case was referred to Dr. Schwartz for a referee examination.

The Board finds that Dr. Schwartz's May 25, 2012 report is entitled to special weight because his opinion on causal relationship was well rationalized and based on a proper factual and medical history. Dr. Schwartz reviewed the February 2, 2011 statement of accepted facts and medical file. He conducted a physical examination and spirometry study, both of which yielded unremarkable results. Also, in light of confusion between the opposing opinions of Drs. Repsher and Johnson, Dr. Schwartz conducted a high-resolution CT scan of the chest did not exhibit pleural abnormalities or any evidence of interstitial lung disease. Based on these findings, he concluded that appellant did not sustain a pulmonary condition due to his occupational asbestos exposure. Appellant did not furnish sufficient medical evidence to overcome the special weight afforded to Dr. Schwartz's opinion: neither Dr. Bertoldo's December 4, 2012 chest x-ray evaluation nor Dr. Shapiro's December 6, 2012 report even addressed the issue of causal relationship. Consequently, the Board finds that OWCP properly denied his occupational disease claim.

Counsel contends that the February 4, 2013 decision is contrary to fact and law. The Board has already addressed the deficiencies of this claim. 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.

## ***CONCLUSION***

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

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

[9] 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321.

[10] *L.W.*, 59 ECAB 471 (2007); *James P. Roberts*, 31 ECAB 1010 (1980).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the February 4, 2013 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 26, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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