

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

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| T.W., Appellant |) | |
| |) | |
| and |) | Docket No. 12-1882 |
| |) | Issued: March 12, 2013 |
| DEPARTMENT OF HOMELAND SECURITY, |) | |
| CUSTOMS & BORDER PROTECTION, |) | |
| Washington, DC, Employer |) | |
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| <i>Appearances:</i> | <i>Case Submitted on the Record</i> |
| <i>Appellant, pro se</i> | |
| <i>Office of Solicitor, for the Director</i> | |

ORDER REMANDING CASE

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

Appellant filed an application for review of the Office of Workers' Compensation Programs' (OWCP) July 18, 2012 merit decision denying his traumatic injury claim.¹ The appeal was docketed as No. 12-1942. After considering the evidence of record, the Board finds this case is not in posture for a decision.

This appeal involves appellant's July 8, 2011 traumatic injury claim (File No. xxxxxx436), in which he alleged that he suffered whole body radiation exposure on December 21, 2006 when the door to the "source" was unexpectedly opened while he was outside of the safety exclusion zone. Appellant's coworker corroborated his version of the facts. As a result of the December 2006 incident and continuing exposure to unknown levels of radiation for several years, he alleged that he developed Hashimoto's disease. Appellant indicated that he was unable to provide exact radiation exposure rates due to the fact that the information was in the possession of the employing establishment or was not properly monitored. On November 9, 2011 OWCP asked the employing establishment to provide additional information regarding the extent and duration of his radiation exposure.

¹ OWCP treated appellant's claim as one for both traumatic injury and occupational disease. Appellant alleged that he was exposed to radiation in the performance of duty on December 21, 2006, as well as on numerous other occasions.

The employing establishment controverted the claim. It contended that, because appellant's exposure was either at or just above background radiation levels and was for only a few seconds, a conventional meter would not likely record the exposure. The employing establishment denied his claim that he was standing in front of the operator's door when the exposure occurred and contended, therefore, that neither he nor his coworker were directly exposed. It asserted that a printout of the "scan" of the December 21, 2006 incident revealed that no one was physically scanned by the equipment but the printout was unavailable.

In a decision dated January 6, 2012, OWCP denied appellant's claim finding that he had failed to establish that the events occurred as described or that he was exposed to unacceptable radiation levels either on December 21, 2006 or over a period of time. Appellant requested an oral hearing.

In a decision dated July 18, 2012, an OWCP hearing representative affirmed the January 6, 2012 decision. He found that appellant had failed to establish that he was exposed to radiation or that his diagnosed Hashimoto's disease was caused by radiation exposure. The hearing representative accepted that the December 21, 2006 incident occurred but found that there was no evidence that appellant was exposed to radiation during the incident. He also found that there was no evidence that appellant was exposed to radiation sufficient to cause acceleration or to precipitate his thyroid condition.² After considering the evidence, the Board finds that this case is not in posture for a decision.

On November 9, 2011 OWCP asked the employing establishment to provide additional information regarding the extent and duration of appellant's radiation exposure. While the employing establishment controverted his claim, it did not provide exact radiation exposure rates, daily rosters or data on cumulative radiation exposure. Absent such information, it is impossible for a physician to provide an opinion as to whether appellant's radiation exposure was sufficient to cause or contribute to his diagnosed thyroid disease. OWCP accepted that the claimed incident occurred on December 21, 2006, namely that the door to the "source" unexpectedly opened, releasing some degree of radiation in an area where appellant was located. Information pertaining to the radiation exposure rates is essential to an ultimate determination as to whether he sustained an injury causally related to his employment. An employer's reluctance or refusal to submit requested evidence relating to an employee's claim should not be an impediment to a successful prosecution of the claim.³ In the present case, the type of information being sought is normally within the custody of the employing establishment and not readily available to appellant⁴. Accordingly, appellant should not be penalized for the employing establishment's failure to submit such information.⁵

² The Board notes that appellant requested that the hearing representative issue subpoenas to the employing establishment for all correspondence and other documentation concerning radiation exposure in the workplace, including OSHA reports and daily rosters confirming appellant's exposure during the course of his employment. The hearing representative denied appellant's requests.

³ See *Jerome J. Kubin*, Docket No. 03-1830 (issued October 1, 2003).

⁴ See *Marco A. Padilla*, 51 ECAB 202 (1999).

⁵ See *id.*

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While an employee has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and has the obligation to see that justice is done.⁶ On remand OWCP should again request any pertinent information from the employing establishment regarding appellant's radiation exposure on December 21, 2006, as well as all information and documentation relating to actual levels of exposure at the employing establishment and the dates of his exposure. In particular, OWCP should obtain the daily rosters from April 2003 to September 2010, as well as a printout of the scan of the December 21, 2006 incident. It should inform the employing establishment of its obligations under the provisions of section 10.118(a) of the code of federal regulations.⁷

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' July 18, 2012 decision be set aside and the case remanded for further development consistent with this order. After such further development as it deems necessary, OWCP shall issue an appropriate merit decision.⁸

Issued: March 12, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

⁶ *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *William J. Cantrell*, 34 ECAB 1233 (1983).

⁷ Section 10.118(a) provides that the employer is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means. 20 C.F.R. § 10.118(a) (2011).

⁸ The Board notes that there was a discrepancy in the evidence regarding the location of appellant during the December 21, 2006 incident. OWCP should make specific findings, based on current evidence of record, including the witness statement from appellant's coworker, Mr. Burrill, and further development of the factual evidence.