

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

<p>L.S., Appellant</p> <p>and</p> <p>DEPARTMENT OF HOMELAND SECURITY, FEDERAL PROTECTION SERVICE, Newark, NJ, Employer</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 13-1628</p> <p>Issued: November 26, 2013</p>
---	---	--

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 28, 2013 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs (OWCP) dated June 6, 2013. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant developed an asbestos-related condition due to factors of his federal employment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 58-year-old police officer, filed a Form CA-2 claim for occupational disease on January 16, 2013, alleging an asbestos-related condition due to working in a building undergoing asbestos abatement.

On March 14, 2013 OWCP advised appellant that it required additional factual and medical evidence to determine whether he was eligible for compensation benefits. It asked him to submit a comprehensive medical report from his treating physician describing his symptoms and the medical reasons for his condition, and an opinion as to whether his claimed condition was causally related to his federal employment, and a diagnosis of his claimed condition. OWCP requested that appellant submit the additional evidence within 30 days.

In an April 3, 2013 statement, appellant asserted that the building where he worked on a daily basis began undergoing some structural work and abating floors that had asbestos in January 2013. He worked on the second floor where air quality testing showed positive test results for asbestos exposure. Appellant stated that the floor had been evacuated and that a clean-up process was underway.

In a report dated February 19, 2013, Dr. Robert Sussman, Board-certified in critical care medicine, conducted an examination of appellant because he worked in a building that was found to have asbestos. The construction had been ongoing in the building over the past year; apparently a significant amount of asbestos had been released into the air and abatement of the asbestos was currently taking place. Dr. Sussman advised that, given the possibility that appellant had experienced long-term exposure to asbestos, a pulmonary evaluation had been requested. On examination appellant had no symptoms of dyspnea on exertion, cough, chest pain or unexplained weight loss. Appellant related that he had recurrent bronchitis approximately once per year, typically in the winter, and had no history of asthma or wheezing.

Dr. Sussman stated that appellant had a history of gastroesophageal reflux, allergic rhinitis and hypertension, with no known allergies. His lungs were clear with no wheezing or rales, no tactile fremitus or hyperresonance to percussion. Dr. Sussman obtained chest x-rays which showed a poor inspiration with borderline heart size, with no pleural disease or evidence for interstitial disease. Appellant also underwent pulmonary function tests which revealed a mild reduction in the vital capacity and expiratory reserve volume (ERV) with the remainder of the lung volumes and the diffusing capacity normal.

Dr. Sussman concluded that appellant had experienced a very low level of asbestos exposure for 18 years, with more pronounced asbestos exposure over the past year. He showed no evidence of any pulmonary pathology. Dr. Sussman opined that appellant probably had low potential for future asbestos-related problems, including asbestosis, bronchogenic carcinoma or mesothelioma. He noted that he had a small nodule in the left lower lobe and recommended a computerized tomography (CT) scan of the chest.

In a February 19, 2013 report, Dr. Terrence H. Lee, Board-certified in diagnostic radiology, noted that appellant reported with symptoms of coughing and a history of asbestos exposure. Appellant underwent frontal and lateral chest radiographic tests. Dr. Lee stated that the

results of these tests showed a left lower lobe nodularity. The tests also indicated a normal cardio-mediastinal contour with no focal consolidation, pleural effusion or pneumothorax; the visualized osseous structures were intact. Dr. Lee recommended a CT scan for further evaluation.

By decision dated June 6, 2013, OWCP denied appellant's claim. It found that he failed to submit sufficient medical evidence to support an asbestos-related condition arising in the performance of duty.

LEGAL PRECEDENT

An occupational disease or illness means a condition produced by the work environment over a period longer than a single workday or shift.² 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 a disease or condition for which compensation is claimed; (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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.³

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.⁴

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.⁵ Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence.

ANALYSIS

Appellant alleged that he was exposed to asbestos in the building where he worked. In January 2013 his work site began abating floors containing asbestos. Appellant stated that air quality testing obtained on his floor showed positive for asbestos exposure. The Board finds that appellant, however, failed to submit sufficient medical evidence to establish a pulmonary condition causally related to this exposure.

² 20 C.F.R. § 10.5(q).

³ *Solomon Polen*, 51 ECAB 341, 343-44 (2000).

⁴ *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

⁵ *Id.*

Dr. Lee stated in his February 19, 2013 report that appellant had chronic coughing and a history of asbestos exposure. He indicated that appellant underwent frontal and lateral chest radiographic tests which revealed a left lower lobe nodularity. Dr. Lee scheduled him for CT scan testing.

In a February 29, 2013 report, Dr. Sussman obtained a history that appellant had been exposed to a significant amount of asbestos at his work site and was referred for a pulmonary evaluation. He stated that on examination appellant had no symptoms of dyspnea on exertion, cough, chest pain or unexplained weight loss. Dr. Sussman advised that his lungs were clear with no wheezing or rales, no tactile fremitus or hyperresonance to percussion; chest x-ray tests showed a poor inspiration with borderline heart size, with no pleural disease or evidence for interstitial disease. He administered pulmonary function tests which revealed a mild reduction in the vital capacity and ERV with the remainder of the lung volumes and the diffusing capacity normal. Dr. Sussman asserted that appellant was exposed to a very low level of asbestos for many years, with more significant asbestos exposure over the past year, and showed no evidence of any pulmonary pathology. He stated that there was a minimal chance that appellant would eventually experience asbestos-related problems such as asbestosis, bronchogenic carcinoma and mesothelioma. Dr. Sussman noted that he had a small nodule in the left lower lobe and recommended that he undergo a CT scan of the chest.

The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of a physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.⁶ The reports from Drs. Sussman and Lee are not sufficient to meet appellant's burden of proof. Neither physician offered an opinion supporting a diagnosis of asbestosis or other pulmonary condition causally related to the accepted employment exposure to asbestos. Both Drs. Lee and Sussman noted a small nodule on appellant's left lobe. The physicians did not address how appellant's exposure to asbestos caused or contributed to this condition. Appellant failed to provide a rationalized, probative medical opinion relating his current condition to factors of his employment.

OWCP advised appellant of the evidence required to establish his claim; however, appellant failed to submit such evidence. It properly denied appellant's claim for compensation.

Appellant may submit new evidence or argument with a 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 has not met his burden of proof in establishing that he developed an asbestos-related condition due to exposure to asbestos in the performance of his federal job duties.

⁶ See *Anna C. Leanza*, 48 ECAB 115 (1996).

ORDER

IT IS HEREBY ORDERED THAT the June 6, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 26, 2013
Washington, DC

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

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

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