

FACTUAL HISTORY

On September 1, 2008 appellant, a 67-year-old supervisory budget analyst, filed an occupational disease claim alleging that she sustained a pulmonary injury in the performance of duty as a result of exposure to polychlorinated biphenyls (PCBs), asbestos and mold spores. OWCP denied her claim on September 21, 2009, finding that she failed to establish causal relationship. It denied reconsideration on September 1, 2010.

Appellant appealed to the Board and, following oral argument, the Board issued an October 13, 2011 decision setting aside the September 1, 2010 OWCP decision and remanding the case for a merit review. The Board found that the June 11, 2010 report of Dr. Janette Harbottle Hope, a Board-certified family practitioner, constituted new and relevant evidence not previously considered. Dr. Hope stated that appellant's exposure to a heavily damaged workplace was the most likely cause of her mycobacterium avium intracellular (MAI) infection and hypersensitivity pneumonitis.³

OWCP found a conflict in medical opinion and referred the case to Dr. Paul Darby, Board-certified in occupational and environmental medicine, to determine whether appellant's diagnosed lung conditions were medically connected to the accepted workplace exposures. It also asked Dr. Darby the following: "If the diagnosis is established and determined to be related to the claimant's employment exposure, please indicate whether she had any disability from work."

On June 20, 2012 Dr. Darby reported that he would answer the questions posed. He found that appellant had diagnosed lung conditions that were directly caused by the accepted employment activities. On the issue of disability, Dr. Darby noted: "The claimant's level of impairment from the work-related condition is currently severe, based upon her needing to stop for breath after walking about 100 yards or for a few minutes on level ground."

On July 30, 2012 OWCP accepted appellant's claim for pulmonary infection due to other mycobacteria, and unspecified allergic alveolitis and pneumonitis. It advised that she could claim lost time from work using the appropriate form.

Appellant filed a claim alleging total disability for work beginning September 3, 2008.⁴ OWCP advised that the medical evidence received to date was insufficient to establish that the accepted conditions disabled her for the period claimed. It requested a narrative medical report including, among other things, a thorough explanation with objective findings as to how appellant's condition had worsened such that she was no longer able to perform the duties of her position beginning September 3, 2008.

Appellant submitted an attending physician's form report dated September 17, 2012, from Dr. Hope who found her totally disabled beginning September 3, 2008.

³ Docket No. 11-815 (issued October 13, 2011).

⁴ The record indicates that appellant voluntarily retired on September 3, 2008.

In a decision dated January 25, 2013, OWCP denied appellant's wage-loss claim. It found that the form report did not explain how her condition worsened such that she could not work beginning September 3, 2008, the date she retired from federal employment.

On September 10, 2013 an OWCP hearing representative affirmed the January 25, 2013 decision. The hearing representative found no well-reasoned medical opinion to support that appellant was totally disabled at the time she retired. The hearing representative noted that reports from 2007 and 2008 did not address whether appellant was disabled from any activity. On May 2, 2008 appellant's symptoms were noted to be fairly low grade and she was described as "certainly not systemically ill." Her symptoms improved through 2008.

On appeal, appellant's representative argues that the opinion of the impartial medical specialist requires clarification on the issue of disability.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.⁵ "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁶

A claimant seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence,⁷ including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁸

OWCP is not a disinterested arbiter, however, but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on OWCP to see that its administrative processes are impartially and fairly conducted.⁹ While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁰ When OWCP undertakes to develop the medical aspects of a case, it has the responsibility to obtain an evaluation that will resolve the issues involved.¹¹

⁵ 5 U.S.C. § 8102(a).

⁶ 20 C.F.R. § 10.5(f).

⁷ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁸ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁹ *Thomas M. Lee*, 10 ECAB 175, 177 (1958).

¹⁰ *Mary A. Barnett (Frederick E. Barnett)*, 17 ECAB 187, 189 (1965).

¹¹ *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983).

ANALYSIS

When OWCP referred the case to Dr. Darby, the specialist in occupational and environmental medicine, it asked him whether appellant had any disability for work. Although Dr. Darby stated that he would answer the questions posed, he did not fully address the question of her injury-related disability. He responded only that appellant's level of impairment was currently severe. It did not adequately explain, for purposes of paying wage-loss compensation, when the injury-related disability began. Dr. Darby was not fully responsive to OWCP's inquiries.

As OWCP undertook development of the medical evidence on the issue of injury-related disability, the Board finds that it has a responsibility to develop the evidence to a satisfactory conclusion.¹² Accordingly, the Board will set aside OWCP's September 10, 2013 decision and will remand the case for a supplemental report from Dr. Darby on the issue of injury-related disability. After such further development as may become necessary, OWCP shall issue a *de novo* decision on appellant's entitlement to wage-loss compensation.

CONCLUSION

The Board finds that this case is not in posture for decision on whether the accepted employment injury caused disability for work.

¹² In doing so, OWCP should rephrase the question to better procure the information it requires. *See William N. Saathoff*, 8 ECAB 769 (1956) (finding that the deficiency in the medical evidence adduced was attributable to OWCP, then known as the Bureau of Employees' Compensation).

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: August 8, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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