United States Department of Labor
Employees' Compensation Appeals Board

D.G., Appellant	)	
and	)	**Docket No. 14-901**
	)	**Issued: August 21, 2014**
TENNESSEE VALLEY AUTHORITY, PARADISE FOSSIL PLANT, Chattanooga, TN, Employer	)	

Appearances:
Ronald K. Bruce, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 11, 2014 appellant, through counsel, filed a timely appeal from a February 7, 2014 merit decision of the Office of Workers' Compensation Programs' (OWCP) hearing representative which denied his occupational disease claim. 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 this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that his bronchitis and pneumoconiosis were causally related to exposure to dust and fumes in his employment.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 22, 2013 appellant, then a 58-year-old yard equipment technician, filed an occupational disease claim alleging that he developed chronic bronchitis and occupational pneumoconiosis due to exposure to dust and fumes in his former federal employment.[2] He noted that he first became aware of his condition and realized that it resulted from his employment on January 11, 2013. Appellant reported the date of last exposure as October 1, 2012.

In an attached statement, appellant described his work history and exposure to dust and fumes. From March 1974 to 1978, he worked as an aviation hydraulic mechanic in the U.S. Marine Corps and may have had exposure to asbestos. From 1973 to 1974, appellant worked for a private construction company for 10 months operating an end loader, dozer and truck and was exposed to dirt and lime dust on a daily basis. On August 3, 1978 he began work at the employing establishment in Kentucky and worked 11 years in construction, performing maintenance work on diesel-powered dozers, scrapers, cranes, back hoes and track hoes. Appellant was exposed to coal dust, rock dust and dirt dust on a regular basis, to asbestos when brake shoes were removed from the equipment and to diesel fumes and smoke. He did not wear a dust mask and worked eight hours a day, five days a week. From December 20, 1995 to October 1, 2012, appellant worked at the Paradise Plant of the employing establishment operating a bulldozer pushing lead. He was exposed to coal and rock dust, asbestos and diesel fumes. Appellant wore a paper mask when he dumped coal cars.

In a February 1, 2013 narrative report, Dr. Glen R. Baker, a Board-certified internist and pulmonary disease specialist, examined appellant for possible occupationally-induced lung disease. He listed a history that appellant worked as a heavy equipment operator at the employing establishment for 16 to 17 years and in construction for approximately 11 years. Dr. Baker reported that appellant was in areas where asbestos and coal dust were present. He noted that appellant was also stationed on ships when he was in the military from 1974 to 1978 and may have been exposed to asbestos while deployed. Dr. Baker related appellant's complaints of shortness of breath for the last two or three years, cough, sputum production and wheezing. Appellant noted that his breathing was worse with exertion and exposure to hot or cold weather, various dusts, odors and fumes.

Dr. Baker reviewed appellant's medical history and reported that chest x-rays taken on October 19, 2012 revealed evidence of occupational pneumoconiosis. He also observed that a February 1, 2013 spirometry report revealed forced vital capacity (FVC) of 79 percent predicted and forced expiratory volume (FEV_1) of 77 percent predicted for prebronchodilator studies and FVC of 81 percent predicted and FEV_1 of 79 percent predicted for post-bronchodilator studies. Dr. Baker opined that the testing demonstrated a mild restrictive ventilator defect. He provided findings for spirometry and roentgenographic testing and the October 19, 2012 radiograph report. Dr. Baker diagnosed occupational pneumoconiosis, mild restricted ventilator defect and mild bronchitis. He explained that appellant had x-ray changes consistent with both coal workers' pneumoconiosis and pulmonary asbestosis. Dr. Baker opined that appellant's occupational

[2] The record reveals that appellant filed a previous occupational disease claim (File No. xxxxxx612) on December 26, 2011.

pneumoconiosis, mild bronchitis and restrictive ventilatory defect, was due to his exposure to asbestos, coal dust and other chemicals in his work environment. He reported that according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Chapter 5, Table 5-4, appellant had six percent impairment for his pulmonary conditions.

By letter dated April 18, 2013, OWCP advised appellant of the factual and medical evidence needed to substantiate his claim. It requested additional evidence to establish causal relation. OWCP also requested additional evidence from the employing establishment.

In an April 10, 2013 statement, Mike Bradford, an industrial hygiene specialist with the employing establishment, confirmed appellant's employment as a heavy equipment operator from 1978 to 2012. He provided a list of appellant's various job positions and the duration that he worked in his position.[3] Mr. Bradford stated that site exposure data was not available for appellant's specific claimed exposures but industrial hygiene records were available regarding the permissible exposure limits (PELs) for coal dust and asbestos between 1978 and 2012. He reported that the data consistently demonstrated that exposures experienced by similar workers in the same work environments as appellant were below the permissible PEL of 2.4 milligrams per cubic meter of air for coal dust and asbestos. Mr. Bradford explained that the employing establishment washed and cleaned its heavy equipment before repairs were made by gas and diesel mechanics in order to minimize dust exposure. He also stated that most of the equipment that appellant operated used cabs with filtered conditioned air, which minimized any dust exposure during equipment operation. Mr. Bradford concluded that appellant's claim should not be considered work related.

The employing establishment also provided a description of appellant's job duties, his job application and various other personnel records regarding his employment.

In a May 2, 2013 statement, William T. Sabin, an assistant plant manager, confirmed that appellant worked at the employing establishment in construction maintenance from 1978 to 1995 and as a heavy equipment operator from 1995 to 2012. He could not confirm or deny appellant's statement of exposure and stated that medical records would have information regarding whether appellant was exposed to asbestos or dust particles. Mr. Sabin reported that the employing establishment provided a respiratory protection program that was designed to protect workers by limiting the inhalation of airborne contaminates such as dusts, gasses and vapors. He noted that appellant's training records would indicate the employing establishment's commitment to keep employees informed and trained. The employing establishment submitted various respiratory tests, fitness tests, laboratory reports and medical records from throughout appellant's employment.

In a decision dated July 15, 2013, OWCP denied appellant's claim. It accepted that he was exposed to dust and fumes in his employment and was diagnosed with respiratory conditions. OWCP denied his claim finding insufficient medical evidence to establish that his pulmonary conditions were causally related to factors of his employment.

[3] Appellant's job positions included greaser, pan scraper operator, hoist operator, bulldozer operator, equipment operator, heavy equipment operator and yard equipment technician.

By letter and appeal request form dated July 23, 2013, appellant's attorney requested an oral hearing that was held on December 9, 2013. Appellant described his employment history and his exposure to dirt, coal dust and diesel fumes while working with moving equipment at the employing establishment. He breathed in the dust and found it on his skin and clothes daily. Appellant's attorney stated that appellant worked for the employing establishment for 27 years and was exposed to irritants such as coal dust, asbestos, arsenic, lead and ash which all produced occupational lung diseases. He alleged that Dr. Baker's report provided an opinion on causal relationship between appellant's lung condition and his federal work.

In a January 9, 2014 statement, Mike Patty, a workers' compensation analyst at the employing establishment, contended that despite appellant's continuous statements of exposure to coal dust and asbestos he had provided no evidence of actual harmful exposure while the employing establishment provided data which demonstrated that exposure was below the PEL established by Occupational Safety and Health Administration (OSHA). He also questioned Dr. Baker's reliance on x-rays as his basis for diagnosing appellant's condition and asserted that proper diagnosis of pneumoconiosis required high resolution computerized tomography testing.

In a January 14, 2014 statement, counsel responded to Mr. Patty's statements and pointed out that according to Mr. Bradford's January 11, 2013 statement there was no testing available specific to appellant's respirable dust exposure. He reiterated that Dr. Baker reported that appellant's pulmonary conditions were a result of his occupational exposure to asbestos, coal dust and other chemicals in his work environment.

By decision dated February 7, 2014, an OWCP hearing representative affirmed the July 15, 2013 denial decision. He determined that Dr. Baker's report was not sufficiently rationalized to establish causal relation.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence[4] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[5] In an occupational disease claim, appellant's burden requires submission of the following: (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.[6]

[4] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan,* 20 ECAB 55, 58 (1968).

[5] *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton,* 40 ECAB 1143, 1145 (1989).

[6] *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre,* 51 ECAB 623 (2000).

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[7] The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.[8]

ANALYSIS

Appellant claimed that he sustained bronchitis and pneumoconiosis as a result of exposure to coal dust, diesel fumes, dirt and asbestos while working at the employing establishment. OWCP accepted that he was exposed to coal dust and asbestos within OSHA limits for exposure.[9] It denied appellant's claim finding insufficient medical evidence to establish that his pulmonary conditions were causally related to his accepted exposure during federal employment. The Board finds that this case is not in posture for decision as to whether appellant's pulmonary conditions were causally related to his employment.

An employee who claims benefits under FECA has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment. As part of this burden, the employee must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.[10] However, it is well established that proceedings under FECA are not adversarial in nature, and while the employee has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[11]

In support of his claim, appellant submitted a February 1, 2013 report by Dr. Baker, who related appellant's complaints of shortness of breath, cough, sputum production and wheezing. Dr. Baker reviewed appellant's occupational exposure history and noted that he worked as a heavy equipment operator for the employing establishment for 16 to 17 years and in areas with asbestos and coal dust. Dr. Baker reported that an October 12, 2012 chest x-ray revealed evidence of occupational pneumoconiosis and explained that the x-ray changes were consistent with both coal workers' pneumoconiosis and pulmonary asbestosis. He provided findings for spirometry testing and noted mild restrictive ventilator defect. Dr. Baker diagnosed occupational pneumoconiosis, mild restricted ventilator defect and mild bronchitis. He opined that appellant's

[7] *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

[8] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

[9] The fact that appellant's exposures may have been within permissible limits as specified by OSHA does not exclude contact with such respirable agents. This raises a medical issue as to causation. *See P.C.*, Docket No. 08-1964 (issued April 6, 2009).

[10] *Supra* note 5.

[11] *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

occupational pneumoconiosis, mild bronchitis and restrictive ventilatory defect, were due to his asbestos exposure, coal dust exposure and other chemicals in his work environment.

The Board finds that, while Dr. Baker's report is not completely rationalized, it is consistent in supporting that appellant sustained an employment-related injury. Dr. Baker accurately described appellant's occupational history and exposure to coal dust and asbestos at the employing establishment. He provided examination findings and observed mild restrictive ventilator defect. Dr. Baker reviewed appellant's history and noted that x-ray changes were consistent with both coal workers' pneumoconiosis and pulmonary asbestosis. He provided a medical diagnosis and opined that appellant's occupational pneumoconiosis, mild bronchitis and restrictive ventilatory defect, were due to his asbestos exposure, coal dust exposure and other chemicals in his work environment. Although Dr. Baker did not provide a fully-rationalized medical opinion on causal relationship, he provided a consistent opinion based on examination findings and an accurate factual and medical background that appellant's current right shoulder condition was causally related to factors of his employment. While his report is not sufficient to meet appellant's burden of proof to establish his claim, Dr. Baker's opinion raises an uncontroverted inference between appellant's pulmonary condition and his federal employment. It is sufficient to require OWCP to further develop the medical evidence and the case record.[12]

On remand, OWCP should prepare a statement of accepted facts and refer appellant to an appropriate medical specialist for a detailed opinion as to whether his pulmonary conditions are causally related to factors of his employment. Following this and any other further development as deemed necessary, it shall issue an appropriate merit decision on appellant's claim.

CONCLUSION

The Board finds that this case is not in posture for a decision and requires additional development of the medical evidence by OWCP.

[12] *See R.O.*, Docket No. 13-626 (issued June 18, 2013)*; Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2014 merit decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this decision of the Board.

Issued: August 21, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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