United States Department of Labor
Employees' Compensation Appeals Board

G.C., Appellant	)	
and	)	**Docket No. 15-0587**
	)	**Issued: December 9, 2015**
TENNESSE VALLEY AUTHORITY, SEQUOYAH NUCLEAR PLANT, Soddy Daisy, 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:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 23, 2015 appellant, through counsel, filed a timely appeal of a December 2, 2014 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 this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish that he has lung disease causally related to factors of his federal employment.

On appeal counsel argues that there is an unresolved conflict in the medical evidence warranting referral to an impartial medical examiner pursuant to 5 U.S.C. § 8123(a) to resolve the conflict.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 30, 2013 appellant, then a 70-year-old maintenance mechanic/boilermaker, filed an occupational disease claim (Form CA-2) alleging that on February 26, 2013 he first realized that he had an employment-related lung condition.

On June 17, 2013 the employing establishment controverted the claim. It indicated in a report by Mike Bradford, CSP/Industrial Hygienist, that the employing establishment used extensive air monitoring to determine potential exposure to various airborne contaminants and provided protective equipment to ensure that the employee's exposure was within the safety limits set by the Occupational Safety and Health Administration and the Environmental Protection Agency. The employing establishment also noted that appellant had a 20-year history of smoking a pack of cigarettes per day.

By letter dated July 10, 2013, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised as to the medical and factual evidence required and was afforded 30 days to provide this information.

In response to OWCP's request, it received appellant's statement and copies of position descriptions for a boilmaker. One position description noted that the major duties of the position were:

> "general maintenance repairs to boilers, soot blowers, drums, tubes, ash- and coal-handling equipment, pulverizers, ducts and breeching, air preheaters, coal bunkers, burners, heaters, evaporators, etc."

The record contains a second position description for a boilermaker, described the duties as follows:

> "Performs general and emergency welding repairs and maintenance work on a nuclear power plan. The work involves reactor pressure vessels, tubular host exchangers, tanks, condenses, and other plant equipment. The equipment may be radioactive or located in a radiation zone. The work consists of general welding and cutting in accordance with approved welding…."

In his statement, appellant noted that his first job was at the Widows Creek fossil steam plant where he was employed as a boilermaker or certified welder. He alleged that during his work he was exposed to coal dust, welding fumes and smoke, and asbestos from working on the steam pipes and boilers in the form of blankets used while welding. Occasionally, appellant alleged that he was also exposed to arsenic. He related that the dust was very thick as it could be seen in the air and covered the equipment and skin. While working at the Bellefonte Nuclear Plant and the employing establishment appellant stated that he was exposed to asbestos on the pipes wrapping, and gaskets, and exposed to grinding dust and welding smoke and fumes.

In an April 23, 2013 report, Dr. Glen Baker, a treating Board-certified internist with a subspecialty in pulmonary medicine and certified B-reader,[2] noted that appellant has worked at employing establishment plants and nuclear plants as a boilmaker for 45 years. He related that appellant had smoked a pack of cigarettes a day for 20 years, but quit in 2000. Dr. Baker stated that appellant was exposed "to asbestos on a frequent basis as well as coal dust, fly ash and arsenic." Review of an April 20, 2013 chest x-ray interpretation revealed category 1/0 occupational pneumoconiosis. Pulmonary function tests (PFT) showed a mild restrictive ventilator defect. Dr. Baker diagnosed category 1/0 occupational pneumoconiosis and mild restrictive ventilator defect. He noted that appellant's 45-year history of asbestos exposure and the changes observed on the x-ray interpretation were consistent with early pulmonary asbestosis. Dr. Baker attributed the mild restrictive ventilator defect and occupational pneumoconiosis to appellant's work exposure to coal dust, asbestos, fly ash, arsenic, and other chemicals. He opined that appellant's smoking history did not cause any significant pulmonary problem as there was no evidence of any obstructive defect or significant bronchitis.

On November 7, 2013 OWCP referred appellant and a statement of accepted facts and medical evidence to Dr. Allen R. Goldstein, Board-certified in pulmonology and a B-reader, for a second opinion evaluation. The statement of accepted facts noted that appellant's responsibilities as a boilermaker included:

> "general maintenance repairs to boilers, soot blowers, drums, tubes, ash- and coal-handling equipment, pulverizers, ducts and breeching, air preheaters, coal bunkers, burners, heaters, evaporators, etc." [Appellant] will be required as necessary to travel to other plants for emergency work or scheduled major maintenance work."

In a report dated February 4, 2014, Dr. Goldstein noted that he had reviewed Dr. Baker's report, pulmonary function studies, and x-ray interpretation. He noted that appellant had an employment history of working 45 years as a boilmaker and had a 20-year history of smoking one pack of cigarettes per day until quitting in 2000. Dr. Goldstein noted that appellant reported that he removed asbestos as part of performing repair work and that he was in the area where the repair work was performed. He noted that appellant did not talk much about his exposure to coal dust, arsenic, or fly ash. Appellant reported shortness of breath with dyspnea beginning in 2011 as well as some difficulty at night with shortness of breath. He also reported that appellant's symptoms were aggravated by any exertion. Dr. Goldstein noted that appellant could probably walk on level ground about a quarter of a mile.

Dr. Goldstein reviewed a November 25, 2013 x-ray interpretation and found a normal x-ray interpretation. Review of a PFT showed "a restrictive defect with some slight improvement in the small airway flow rates," a slight restriction based on lung volumes and a normal diffusion capacity. Based on Dr. Goldstein's review of the objective tests, medical evidence, and physical examination, he concluded that appellant did not have asbestosis. He explained that appellant's current chest x-ray interpretation was normal and assuming the x-ray interpretation performed by Dr. Baker was 1/0, then appellant has improved which would argue

[2] A B-reader is a physician certified by the National Institute for Occupational Safety and Health as demonstrating proficiency in classifying radiographs of the pneumoconiosis. *Noah Ooten*, 50 ECAB 283 (1999).

against a diagnosis of asbestosis. Regarding causal relationship, Dr. Goldstein related that appellant's restrictive pulmonary function was related to his body stature as a 5'10" male, weighing 260 pounds. He also noted that appellant's normal diffusing capacity argued against any type of interstitial lung disease. In conclusion, Dr. Goldstein opined that there was no evidence supporting a diagnosis of asbestosis or any work-related lung disease.

By decision dated February 19, 2014, OWCP denied appellant's claim finding that the evidence was insufficient to establish that the medical condition is causally related to his work. In reaching this determination it found that the weight of the medical opinion evidence rested with Dr. Goldstein's opinion that appellant had no employment-related asbestosis or any form of lung disease.

On February 27, 2014 appellant's counsel requested an oral telephonic hearing before an OWCP hearing representative, which was held on September 8, 2014.

By decision dated December 2, 2014, OWCP's hearing representative affirmed the February 19, 2014 decision denying appellant's claim. He found that the weight of the evidence rested with Dr. Goldstein's opinion as it was the more rationalized opinion.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of establishing the essential elements of his claim, including the fact that the individual is an employee of the United States within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged, and that any disability and/or specific condition 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 on a traumatic injury or an occupational disease.[5]

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, 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.[6]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[7] Rationalized medical

[3] *Supra* note 1.

[4] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[5] *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *D.U.*, Docket No. 10-144 (issued July 27, 2010); *R.H.*, 59 ECAB 382 (2008); *Roy L. Humphrey*, 57 ECAB 238 (2005); *Donald W. Wenzel*, 56 ECAB 390 (2005).

[7] *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors.[8] 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.[9]

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[10] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[11]

ANALYSIS

Appellant filed an occupational disease claim alleging that he had developed a lung condition due to factors of his federal employment. OWCP noted that the duties of a boilmaker included "general maintenance repairs to boilers, soot blowers, drums, tubes, ash- and coal-handling equipment, pulverizers, ducts and breeching, air preheaters, coal bunkers, burners, heaters, evaporators, etc. The issue, therefore, is whether the medical evidence establishes a causal relationship between the claimed condition and the identified employment factors.

In a report dated April 23, 2013, appellant's physician, Dr. Baker, diagnosed occupational pneumoconiosis by x-ray. He found a mild restrictive ventilatory defect by PFT. Dr. Baker attributed appellant's occupational pneumoconiosis and mild restrictive defect to his exposure while working as a boilermaker to fly ash, coal dust, asbestosis, and other chemicals and fumes. He also noted that appellant had a 45-year history of exposure to asbestos and that changes observed on x-ray examination were consistent with early pulmonary asbestosis. Dr. Baker explained that the 20-year, one pack per day smoking history was not believed to have caused any significant pulmonary problem as he had no obstructive defect or significant bronchitis.

Dr. Goldstein, an OWCP referral physician, found on February 4, 2014 that appellant had nondiagnostic-findings on x-ray, however, appellant had a slight restriction of lung volumes, with normal diffusion capacity. He explained that this finding was related to appellant's height and weight. Dr. Goldstein indicated that he was unable to render a diagnosis of asbestosis based on the current normal x-ray and the improvement seen since the x-ray taken by Dr. Baker. Based

[8] *J.J.*, Docket No. 09-27 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

[9] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[10] 5 U.S.C. § 8123(a). *See S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[11] *A.R.*, Docket No. 09-1566 (issued June 2, 2010); *M.S.*, 58 ECAB 328 (2007); *Bryan O. Crane*, 56 ECAB 713 (2005).

on his review of objective data, he opined that there was no medical evidence to support a diagnosis of asbestosis or any work-related lung disease.

The Board finds that this case is not in posture for a decision due to an unresolved conflict in the medical opinion evidence. Dr. Baker, a certified B-reader and Board-certified internist with a subspecialty in pulmonary medicine, examined appellant's chest x-rays and determined that he had 1/0 occupational pneumoconiosis. He also found that based upon x-ray evidence that appellant had early pulmonary asbestosis. Dr. Baker concluded that appellant's lung conditions were employment related because appellant had a 45-year history of work as a boilermaker.

Dr. Goldstein, also a Board-certified pulmonologist and certified B-reader, reviewed appellant's x-ray and found no abnormalities. While he related that pulmonary function testing revealed a slight restrictive defect, he concluded that this was not employment related.

The Board finds that there is disagreement between the two physicians regarding the results of appellant's diagnostic studies, and whether he has an employment-related lung condition. The Board finds that there is a conflict of medical opinion evidence.

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.[12] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[13]

On remand, OWCP should refer appellant, a statement of accepted facts, a list of specific questions, and his diagnostic studies to an appropriate Board-certified physician and B-reader to determine whether he has any employment-related lung condition.[14] Following this and any necessary further development, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for a decision due to a conflict in the medical opinion evidence.

[12] 5 U.S.C. §§ 8101-8193, 8123; *B.C.*, 58 ECAB 111 (2006); *M.S., id*; *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[13] *R.C.*, 58 ECAB 238 (2006).

[14] *See e.g., S.T.*, Docket No. 13-1977 (issued March 18, 2014 (the interpretation of a B-reader carries more weight when interpreting chest x-rays for evidence of pneumoconiosis).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 2, 2014 is set aside and the case remanded for further proceedings consistent with the above opinion.[15]

Issued: December 9, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[15] James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.