

FACTUAL HISTORY

On May 31, 2011 appellant, then a 61-year-old pipefitter and plumber, filed an occupational disease claim (Form CA-2) alleging that he developed lung cancer as a result of exposure to asbestos at the employing establishment while in the performance of duty.

In a June 24, 2011 letter, OWCP notified appellant of the deficiencies of his claim and requested additional factual and medical evidence. It requested a comprehensive medical report from a treating physician containing a diagnosis of his condition and an explanation of how the alleged work exposure caused or aggravated his claimed condition. OWCP afforded appellant 30 days to submit additional evidence and respond to its inquiries.

Appellant submitted a position description and an April 14, 2010 report from Dr. Nitin Jain, a Board-certified oncologist, who diagnosed squamous cell carcinoma of the lung. Dr. Jain indicated that appellant had a mass in the right upper lobe of the lung. He noted that appellant had a 20 pack a year history of smoking, worked as a pipefitter for the employing establishment but previously worked for the Navy. Dr. Jain stated that appellant was “concerned about going back to work in an environment which he thinks is full of asbestos/dust.”

On May 12, 2010 appellant underwent surgery for his right upper lobe lung cancer performed by Dr. Wickii Vigneswaran, a Board-certified thoracic surgeon.

In an August 18, 2011 letter, the employing establishment controverted appellant’s claim on the basis that he had not worked in areas that may have contained asbestos, abatement was performed by contractors and not employees, and testing was due before they began removal of the asbestos. The employing establishment submitted testing results from 1995 and 1996.

In a letter dated October 27, 2011, the employing establishment indicated that an occupational illness evaluation for appellant was conducted by Kristen Edwards, an industrial hygienist. Documentation showed that appellant was a pipefitter and plumber with the employing establishment from 1993 to 2010. His duties included working with piping located above the ceiling and in confined areas in routine and emergency situations. In the event of an emergency line break, asbestos containing material (ACM) posed a minimal potential for inhalation exposure due to the wet method inhibiting airborne contaminations. Although some pipes may have contained asbestos, if the material was not disturbed and no fugitive dust was generated, the likelihood of inhalation was very minimal. Additionally, employees were advised to wear a particulate respirator when working above the ceiling and suspected ACM was present.

By decision dated November 18, 2011, OWCP denied the claim on the basis that appellant failed to establish fact of injury. It found that the evidence was not sufficient to establish that he was exposed to asbestos or any other agent during the course of his federal employment.

On November 28, 2011 appellant, through counsel, requested an oral hearing before an OWCP hearing representative and submitted a July 15, 2011 computerized tomography scan of the chest and upper abdomen, which revealed an interval increase in the right paratracheal lymph node.

A telephonic hearing was held before an OWCP hearing representative on March 15, 2012.

Appellant submitted an August 20, 2010 chest x-ray, which showed bilateral interstitial fibrosis consistent with asbestosis and blunting of the costophrenic angle consistent with asbestos-related pleural disease. He also submitted pulmonary function analyses dated March 31, 2010 and June 23, 2011.

In an April 5, 2011 report, Dr. Alvin Schonfeld, a Board-certified pulmonologist, did not conduct a physical examination of appellant, but reviewed his medical records and found that he worked for the Navy from 1968 to 1971 and American Invesco Realty from 1973 to 1977. Dr. Schonfeld determined that appellant had been exposed to asbestos during his employment and concluded that this exposure contributed to the development of his lung cancer.

By decision dated May 18, 2012, the hearing representative affirmed the November 18, 2011 decision.

On May 31, 2012 appellant, through counsel, requested reconsideration and submitted a series of reports, including an April 6, 2012 report from Dr. Ravi Salgia, a Board-certified oncologist, who indicated that appellant did not know if there was asbestos in the pipes or in any other material, but that he may have been exposed to asbestos from 1969 to 1971 while employed as a Naval boatswain's mate. Regarding his position as a pipefitter for the employing establishment from 1993 to 2010, he stated that he was provided a "[physician's] facemask" and that particles from pipe insulation would potentially still "get in his mouth" while cutting pipes. Appellant further suggested that there may have been exposure to asbestos from the ground and dirt spaces (crawl space, ceilings).

In a report dated April 26, 2012, Dr. Clara Schroedl, a Board-certified pulmonologist, indicated that appellant's diagnostic testing did not have evidence of asbestos-related lung disease (not pleural plaques, effusion, interstitial lung disease). Dr. Schroedl explained that if his first exposure to asbestos was in 1993, it may have been too early to see asbestosis as the typical latency was 20 to 30 years.

By decision dated June 13, 2014, OWCP denied modification of the May 18, 2012 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA² has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, and that an injury³ was sustained in the performance of duty. These

² *Id.*

³ OWCP regulations define an occupational disease or illness as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

To establish that an injury was sustained in the performance of duty in a claim for an occupational disease claim, an employee must submit 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.⁵

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence. 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.⁶

ANALYSIS

Appellant alleged that he developed lung cancer as a result of being exposed to asbestos at work. The Board finds that he has not established the factual element of his claim that he experienced an employment-related exposure to asbestos.

The record establishes that appellant worked for the Navy from 1968 to 1971, American Invesco Realty from 1973 to 1977, and the employing establishment from 1993 to 2010. There is no evidence to establish that he was exposed to asbestos during his work as a pipefitter and plumber with the employing establishment from 1993 to 2010. In an August 18, 2011 letter, the employing establishment indicated that appellant had not worked in areas that may have contained asbestos. It noted that abatement was performed by contractors and not employees and testing was done before they began removal of the asbestos.

In a letter dated October 27, 2011, the employing establishment explained that an occupational illness evaluation for appellant was conducted by Ms. Edwards, an industrial hygienist. Documentation showed that appellant was a pipefitter and plumber with the employing establishment from 1993 to 2010. His duties included working with piping located above the ceiling and in confined areas in routine and emergency situations. Asbestos containing material posed a minimal potential for inhalation exposure due to the wet method inhibiting airborne contaminations in the event of an emergency line break, and although some pipes may have contained asbestos, if the material was not disturbed and no fugitive dust was generated, the

⁴ See *O.W.*, Docket No. 09-2110 (issued April 22, 2010); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁵ See *D.R.*, Docket No. 09-1723 (issued May 20, 2010). See *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ See *O.W.*, *supra* note 4.

likelihood of inhalation was very minimal. Additionally, employees were advised to wear a particulate respirator when working above the ceiling and suspected ACM was present.

On April 6, 2012 Dr. Salgia indicated that appellant did not know if there was asbestos in the pipes or any other material he worked with, but that he may have been exposed to asbestos from 1969 to 1971 while employed as a Naval boatswain's mate. Regarding his position as a pipefitter for the employing establishment from 1993 to 2010, appellant stated that he was provided a "[physician's] facemask" and that particles from pipe insulation would potentially still "get in his mouth" while cutting pipes. Appellant further suggested that there may have been exposure to asbestos from the ground and dirt spaces (crawl space and ceilings). He was unable to identify the actual source or specific nature of the substances, which he believed caused his lung cancer. The Board finds that appellant has failed to provide sufficient factual evidence to support his exposure to any precise asbestos, dust, or other irritant while working at the employing establishment.

An award of compensation may not be based on surmise, conjecture, or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment, nor his belief that his condition was caused by his employment, is sufficient to establish causal relationship.⁷ Since he failed to establish the first component of fact of injury, it is not necessary to discuss whether he submitted medical evidence sufficient to establish that a medical condition existed and whether the condition was causally related to the employment factors alleged.⁸

On appeal, counsel contends that OWCP's decision was contrary to fact and law. For the reasons stated above, the Board finds that counsel's arguments are not substantiated.

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 to establish that he sustained an injury in the performance of duty.

⁷ See *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁸ See *Bonnie A. Contreras*, 57 ECAB 364, 368 n.10 (2006).

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 7, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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