United States Department of Labor
Employees' Compensation Appeals Board

O.G., Appellant	)	
and	)	**Docket No. 16-1354**
	)	**Issued: January 3, 2017**
TENNESSEE VALLEY AUTHORITY, WIDOWS CREEK FOSSIL PLANT, Stevenson, AL, Employer	)	

Appearances:
Ronald K. Bruce, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 14, 2015 appellant, through counsel, filed a timely appeal from an August 11, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a pulmonary condition causally related to factors of his federal employment.

FACTUAL HISTORY

On April 30, 2014 appellant, then a 62-year-old boilermaker/welder, filed an occupational disease claim (Form CA-2) alleging that he sustained occupational pneumoconiosis, asbestosis, and bronchitis due to factors of his federal employment. He submitted a statement describing his work as a boilermaker for the employing establishment for intermittent periods beginning December 1987. Appellant advised that he was exposed to smoke from welding, fumes, coal dust, and grinding dust daily. He also related that he was exposed to asbestos from steam pipes and blankets and argon and helium gases. Appellant sometimes wore paper masks. He indicated that from 1971 to 2009 he worked either directly for the employing establishment, as a contractor for the employing establishment, or at other power plants and paper mills with similar exposure to fumes, dust, and gases.

On February 16, 2013 Dr. Glen Baker, a Board-certified pulmonologist and certified B-reader, interpreted an x-ray obtained December 27, 2012 as showing parenchymal abnormalities consistent with pneumoconiosis. He determined that a pulmonary function study (PFS) performed February 16, 2013 was normal.

In a report dated February 18, 2013, Dr. Baker related, "[Appellant] worked as a boilermaker for approximately 37 years. He worked at power plants, paper mills, refineries, and nuclear reactors. [Appellant] was exposed to asbestos, coal dust, fly ash, arsenic, lead, and other unknown chemicals, fumes, and odors of unclear etiology that he was not aware of." He noted that appellant had a history of smoking for three years as a teenager 42 years earlier. Dr. Baker discussed appellant's complaints of dyspnea and shortness of breath for 10 years and noted that a December 27, 2012 x-ray revealed category 1/0 pneumoconiosis with pulmonary asbestosis. He diagnosed occupational pneumoconiosis with pulmonary asbestosis and bronchitis by history. Dr. Baker further related that, "[Appellant] had a long history of asbestos exposure as well as exposure to coal dust, welding fumes, and welding smoke. His occupational pneumoconiosis and bronchitis are due to his exposure to asbestos, coal dust, welding fumes and welding smoke; all of which have contributed to his pneumoconiosis and chronic bronchitis." He indicated that the PFS was normal, but found that appellant had four percent pulmonary impairment due to his symptoms.

On May 13, 2013 the employing establishment indicated that it employed appellant for intermittent periods totaling 4.8 years from September 1975 to May 1990. It related that exposure data was unavailable specifically for him, but that general data for coal dust and asbestos at the relevant facilities showed levels below permissible exposure limits. The employing establishment asserted that it did not use paper masks to protect from respiratory hazards above permissible limits.

Counsel, in a statement dated May 23, 2013, discussed appellant's work history from 1971 to 2009 either with the employing establishment or with contractors at paper mills and

power plants, including those operated by the employing establishment. He submitted a copy of appellant's employment history.

On September 10, 2013 OWCP referred appellant to Dr. Allan Goldstein, a Board-certified internist and pulmonologist, for a second opinion examination. Dr. Goldstein's office advised OWCP on October 16, 2013 that appellant had not attended the scheduled appointment.

By decision dated October 16, 2013, OWCP denied appellant's claim as the medical evidence was insufficient to show that he sustained a pulmonary condition as a result of exposure to coal dust and asbestos due to factors of his federal employment. It noted in its decision that he had failed to attend the scheduled second opinion examination.

On October 24, 2013 appellant requested a telephone hearing with an OWCP hearing representative.

Dr. Matthew A. Vuskovich, who specializes in occupational medicine and is a B-reader, interpreted the December 27, 2012 x-ray as showing category 1/2 pneumoconiosis.[3]

At the telephone hearing, held on May 12, 2014, appellant described his work as a boilermaker and advised that he used blankets containing asbestos as a heat shield. He noted that he used paper masks as protection. Appellant related that while working at a nuclear facility he was exposed to fumes from welding, dust, helium, argon, and asbestos. He explained why he did not attend the scheduled second opinion examination.

On June 19, 2014 the employing establishment reviewed the hearing transcript and advised that there was no evidence that the level of coal dust, dust, asbestos, or other airborne particles and gases exceed permissible limits as set by the Occupational Safety and Health Administration (OSHA). It noted that appellant was unsure of what materials contained asbestosis and asserted that asbestos would not become airborne through the use of blankets containing the substance. The employing establishment challenged his allegation that he used paper masks, noting that it provided purifying respirators to those needing protection, and noted that he discussed nonfederal employment at the hearing. It asserted that x-rays alone were insufficient to support a diagnosis of pneumoconiosis. The employing establishment maintained that in *M.W.*,[4] the Board held that a condition could not arise from exposure below permissible levels. It related that Dr. Stephen Adams, Board-certified in family practice, quoted an article recommending computerized tomography scans be used to diagnose pneumoconiosis.

In a response dated July 1, 2014, counsel noted that the employing establishment had no exposure levels specific to appellant and advised that paper masks were used in the 1970s and 1980s. He contended that *M.W.* was irrelevant as it concerned fumes below detectable levels rather than below permissible levels of exposure. Counsel also noted that Dr. Adams was a family practitioner who had not examined appellant. He asserted that the medical evidence

[3] Dr. Vuskovich indicated that he interpreted the x-ray on April 21, 2012. However, this indication appears to be a typographical error.

[4] 57 ECAB 710 (2006) (the Board found that appellant had not established exposure to strong odors or chemicals at work when surveys found no detectable levels of chemicals).

established that he had an occupational pulmonary condition due at least in part to his federal employment.

By decision dated July 25, 2014, OWCP's hearing representative set aside the October 16, 2013 decision. He found that the medical evidence from Dr. Vuskovich and Dr. Baker was sufficient to warrant further development of the evidence. The hearing representative further found that appellant sufficiently explained his failure to attend the scheduled second opinion appointment and instructed OWCP to refer him for a new second opinion examination.

OWCP, on August 5, 2014, referred appellant to Dr. Richard E. Parrish, a Board-certified internist and pulmonologist, for a second opinion examination. In a report dated September 4, 2014, Dr. Parrish reviewed appellant's work history and noted that the levels of coal dust, dust, and asbestos were below permissible exposure levels as set by OSHA. On examination, he found no cyanosis, clubbing, edema, or abnormal breathing. A PFS dated September 4, 2014 showed results before bronchodilator of 77 percent. Dr. Parrish interpreted an x-ray and the PFS obtained that date as normal. He found that appellant had no diagnosable pulmonary condition, including pneumoconiosis.

In a decision dated November 4, 2014, OWCP denied appellant's claim after finding that the opinion of Dr. Parrish represented the weight of the evidence and found that appellant had not met his burden of proof to establish an employment-related pulmonary condition.

Counsel, on November 13, 2014, requested a telephone hearing. In a report dated May 14, 2015, Dr. Baker discussed appellant's 37-year history as a boilermaker with exposure to "asbestos, coal dust, fly ash, arsenic, lead, and other chemicals, fumes and odors of unclear etiology." He noted that his x-ray and symptoms of bronchitis were "positive for pulmonary asbestosis." Dr. Baker concluded, "I feel [appellant's] employment at [the employing establishment] contributed to the development of bronchitis and occupational pneumoconiosis with pulmonary asbestosis."

At the telephone hearing, held on June 17, 2015, counsel asserted that Dr. Parrish's opinion was entitled to less weight as he was not a B-reader, noting that OWCP's procedures provided that the opinion of an expert was entitled to more weight. He maintained that the record contained a conflict in opinion.

In an August 11, 2015 decision, OWCP's hearing representative affirmed the November 4, 2014 decision. She found that Dr. Baker had not provided a sufficiently rationalized opinion and thus his opinion was entitled to less weight than that of Dr. Parrish.

On appeal counsel contends that the opinion of Dr. Baker is entitled to more weight than that of Dr. Parrish as he is a B-reader. He notes that Dr. Vuskovich, who is also a B-reader, found that he had pneumoconiosis by x-ray. Citing OWCP's procedures, counsel asserts that opinions from physicians in specialized fields have greater probative value. He maintains that Dr. Parrish did not explain his finding that appellant had a normal PFS when it was 77 percent of predicted before bronchodilator, a ratable impairment. In the alternative, counsel alleges that a

conflict exists between Dr. Baker and Dr. Parrish necessitating referral to an impartial medical examiner.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish 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 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.[5] 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.[6]

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 the disease or condition for which compensation is claimed;[7] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[8] and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[9]

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant,[10] must be one of reasonable medical certainty[11] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[12]

ANALYSIS

Appellant alleged that he developed occupational pneumoconiosis, asbestosis, and bronchitis as a result of exposure to coal dust, welding fumes, grinding dust, and other fumes and chemicals in the course of his federal employment. He worked for the employing establishment for 4.8 years between 1975 and 1990.

---

[5] *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[7] *Michael R. Shaffer*, 55 ECAB 386 (2004).

[8] *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[9] *Beverly A. Spencer*, 55 ECAB 501 (2004).

[10] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[11] *John W. Montoya*, 54 ECAB 306 (2003).

[12] *Judy C. Rogers*, 54 ECAB 693 (2003).

In support of his claim, appellant submitted evidence from Dr. Baker, a Board-certified pulmonologist and B-reader. On February 18, 2013 Dr. Baker interpreted a December 27, 2012 x-ray as showing pneumoconiosis category 1/0 and pulmonary asbestosis. He noted that appellant worked as a boilermaker for 37 years at power plants, paper mills, nuclear reactors, and refiners, and had an extensive history of exposure to coal dust, asbestos, welding fumes, and welding smoke. Dr. Baker attributed his pneumoconiosis and bronchitis to his exposure to asbestos, coal dust, and fumes from welding. On May 14, 2015 he again noted that appellant had a 37-year work history as a boilermaker with exposure to asbestos, coal dust, arsenic, lead, and other chemicals. Dr. Baker diagnosed pulmonary asbestosis by x-ray and symptoms of bronchitis. He opined that appellant's federal employment contributed to his occupational pneumoconiosis with pulmonary asbestosis and bronchitis.

The Board find's that Dr. Baker's opinion is of diminished probative value as he based his conclusions on appellant's 37-year history of exposure to welding fumes, coal dust, and asbestos without recognizing that he worked directly for the employing establishment for only 4.8 years.[13] A physician's opinion must be based on a complete and accurate factual and medical background and must be supported by medical rationale.[14] Dr. Baker did not base his opinion on a complete work history and, consequently, his report is of diminished probative value.[15]

Appellant also submitted a report from Dr. Vuskovich, a certified B-reader, who interpreted the December 27, 2012 x-ray as demonstrating category 1/2 pneumoconiosis. Dr. Vuskovich did not, however, address causation and thus his opinion is of little probative value.[16]

OWCP referred appellant to Dr. Parrish for a second opinion examination. In a report dated September 4, 2014, Dr. Parrish discussed appellant's history of working for the employing establishment on intermittent dates from September 1975 until May 25, 1990. He noted that the employing establishment advised that the exposure data obtained during appellant's employment showed levels of dust, coals dust, and asbestos at the facilities within permissible exposure limits set by OSHA. Dr. Parrish found that he had no clubbing, edema, cyanosis, or abnormal breathing on examination. He interpreted x-rays and PFS obtained that date as within normal limits. Dr. Parrish concluded that appellant did not have pneumoconiosis or any other pulmonary condition.

The Board finds that Dr. Parrish's opinion is entitled to the weight of the evidence as he based his opinion on an accurate factual history and was aware that appellant's federal employment exposure constituted only a small part of his total work history.[17] Dr. Parrish

[13] *See K.A.*, Docket No. 15-0057 (issued February 23, 2015).

[14] *See Roger Dingess*, 47 ECAB 123 (1995).

[15] *See Joseph M. Popp*, 48 ECAB 624 (1997).

[16] *See K.W.*, 59 ECAB 271 (2007); *A.D.*, ECAB 149 (2006); *Linda I. Sprague*, 48 ECAB 386 (1997) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[17] *See supra* note 13.

provided a thorough review of the factual and medical background and concluded that appellant had no evidence of a pulmonary condition based on examination findings and objective testing.

On appeal counsel contends that Dr. Baker is entitled to more weight than that of Dr. Parrish as he is a certified B-reader. He notes that Dr. Vuskovich, who is also a certified B-reader, found that he had pneumoconiosis by x-ray. OWCP procedures require that in asbestos disease cases the chest x-ray shall be read by either a Board-certified radiologist or pulmonary specialist.[18] Neither FECA nor OWCP's regulations require an x-ray be interpreted by a certified B-reader.[19]

Counsel maintains that Dr. Parrish did not explain his finding that appellant had a normal PFS when it was 77 percent of predicted before bronchodilator, a ratable impairment. The issue of whether he had a ratable pulmonary impairment, however, is a separate determination from whether he sustained an employment-related pulmonary condition. Counsel further alleges that a conflict exists between Dr. Baker and Dr. Parrish. As discussed, however, Dr. Baker relied upon an inaccurate history of injury and thus his opinion is of diminished probative value and insufficient to create a conflict in medical opinion.[20]

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 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 a pulmonary condition causally related to factors of his federal employment.

[18] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(b) (Exhibit 7) (December 1994).

[19] *See D.C.*, Docket No. 14-1198 (issued December 1, 2015); *M.D.*, Docket No. 14-2037 (issued February 24, 2015).

[20] *See supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 3, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board