



## ISSUE

The issue is whether appellant has met his burden of proof to establish various cancer conditions causally related to the accepted factors of his federal employment.

## FACTUAL HISTORY

On August 25, 2015 appellant, then a 59-year-old special agent, filed an occupational disease claim (Form CA-2) alleging that he sustained a sinus condition and cancer causally related to exposure to airborne dust, smoke and particles while working in the vicinity of the World Trade Center (WTC) following the September 11, 2001 terrorist attacks. He noted that he first became aware of his claimed conditions on September 12, 2001 and realized their relation to his federal employment on August 18, 2015. Appellant further noted that he had reported his conditions to a September 11, 2001 WTC Health Program years prior and that they had recently certified “both cancers and inflamed/chronic sinus problems” as tied to the WTC attacks.

With his claim form, appellant submitted letters from Dr. John Howard, a Board-certified internist, serving in the capacity as administrator of the WTC Health Program. In an August 5, 2015 letter, Dr. Howard informed appellant that the program had certified the condition of upper respiratory disease as covered for medical treatment. In an August 24, 2015 letter, he advised appellant that the WTC Health Program had certified payment of medical expenses for the additional conditions of secondary malignant neoplasm of the lung and malignant neoplasm of the rectosigmoid junction.

The record contains progress reports regarding appellant’s treatment for metastatic colon cancer beginning in 2009.<sup>3</sup> In 2015, appellant received treatment for recurrent colon cancer.

Appellant, in a statement received February 8, 2016, described his employment history and noted that while working in the vicinity of the WTC he was exposed to dust, smoke, and other particulates that contained carcinogens. He cited news sources, medical publications, and experts that indicated that first responders at the WTC had an increased cancer risk due to exposure to “benzene, asbestos, pulverized building materials/glass, and cement dust.” Appellant related that he spent approximately 72 hours in the vicinity of the WTC. He advised that when he returned home from the WTC zone in 2001 he had experienced respiratory problems including a cough and a sinus condition. Appellant subsequently learned that other responders had experienced respiratory and sinus issues and reported his medical condition to the WTC Health Program, who reviewed his medical history. The WTC Health Program had certified that his cancers and sinus condition had resulted from his exposure to gas, smoke, dust, and carcinogens while working at the WTC. Appellant related that he was diagnosed with lung and abdomen cancer in 2008 and 2009.

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<sup>3</sup> In a March 31, 2009 progress report, Dr. David Patrick Ryan, a Board-certified oncologist, indicated that appellant’s December 5, 2008 colonoscopy had revealed colon cancer and that subsequent diagnostic studies had shown lung nodules. He noted appellant’s past medical history of exposure for 48 hours at Ground Zero without respiratory protection, upper respiratory complaints in late 2001 to early 2002, and an inguinal hernia repair in 2008.

In a February 5, 2016 letter, Dr. Howard responded to an e-mail from appellant requesting a letter about his condition(s) through the WTC Health Program. He explained that for a health condition to be certified under the program, a physician associated with the Nationwide Provider Network “must first make a determination that an individual’s WTC exposure to airborne toxins, other hazards, or adverse conditions resulting from the September 11, 2001 terrorist attacks (9/11 exposure) is substantially likely to be a significant factor in aggravating, contributing to, or causing an individual’s health condition.” Dr. Howard further explained that, based on the review of appellant’s exposure activities and medical records, the WTC Health Program physician believed that appellant’s conditions (chronic rhinitis, unspecified sinusitis, malignant neoplasm of the rectosigmoid, and secondary malignant neoplasm of the lung) were directly related to his WTC exposure. As such, the WTC Health Program approved certification of appellant’s conditions in August 2015.

OWCP on July 14, 2016 referred appellant to Dr. Sonali Shah, a Board-certified internist and oncologist, for a second opinion examination.

In a report dated July 29, 2016, Dr. Shah noted that appellant had initially experienced respiratory symptoms after working around the WTC in September 2001, but had attributed it to an allergy. She diagnosed metastatic colon cancer and discussed treatment options. Dr. Shah advised that there was no way to respond to questions about causation absent hypothetical and impossible clinical trials. She asserted that it was impossible to ascertain whether appellant’s colon cancer predated his exposure to carcinogens on September 11, 2001. Dr. Shah advised that studies which demonstrated an increase in cancer among firefighters exposed at the WTC had to be interpreted with caution. She related, “On the other hand, given the lack of data and continued need for long term follow-up it is also difficult to exclude that [appellant’s] condition was related to his governmental exposure as well. Often studies that are statistically nonsignificant initially become significant later with longer follow up.” Dr. Shah concluded that she was unable to opine that appellant’s metastatic colon cancer was directly aggravated by the specific factors of his federal employment.” She further related, “I am aware another WTC associated [physician] has stated [that appellant’s] condition is directly related to this exposure. My opinion does not contradict this other physician, and is solely my own opinion based on the evidence that is currently available to me at the time of this particular consultation.”

OWCP determined that a conflict in medical opinion existed between Dr. Howard and Dr. Shah regarding whether appellant sustained various cancer conditions cancer causally related to factors of his federal employment. It referred him to Dr. Ramesh Shivdasani, a Board-certified oncologist, for an impartial medical examination.

In a report dated April 6, 2017, Dr. Shivdasani reviewed appellant’s history of respiratory symptoms after serving as a first responder at the WTC on September 11, 2001 and his medical treatment following his diagnosis of metastatic colon cancer. He diagnosed metastatic colon cancer with bilateral pulmonary wedge resections in 2010 and a left lobectomy and lingulectomy in November 2016. Dr. Shivdasani opined that it was impossible to definitively answer the question of whether appellant’s condition was caused or aggravated by his work as a first responder around the WTC area. He noted that colon cancer was a common condition with a long history prior to diagnosis, which “makes it difficult to estimate the increased rate of cancers in individuals exposed to the post-9/11 environment.” Dr. Shivdasani opined that a study showing increased

cancer rates in firefighters exposed to debris and fumes after the WTC collapse had a confidence interval “indicating a lack of statistical confidence in the environmental triggers.” He asserted, “One certainly cannot rule out the possibility, but if the standard is ‘to a reasonable degree of likelihood,’ there is insufficient evidence to implicate this environmental exposure as the likely causative factor.” Dr. Shivdasani concluded that he could not “say with conviction that [appellant’s] condition was caused or aggravated by his exposure...” at the WTC.

By decision dated May 12, 2017, OWCP denied appellant’s occupational disease claim. It found that Dr. Shivdasani’s opinion constituted the special weight of the evidence and established that appellant’s condition was not caused or aggravated by the accepted work factor.

Appellant on June 7, 2017 requested an oral hearing before an OWCP hearing representative. During the December 12, 2017 telephonic hearing, he noted that a physician working for the Centers for Disease Control had found that his medical conditions were due to his exposure after the September 11, 2001 terror attacks. Appellant also asserted that OWCP had failed to consider that he sustained sinusitis and rhinitis due to his employment exposure. He noted that the opinion of both OWCP referral physicians were equivocal regarding whether his work exposure had caused his condition.

By decision dated February 16, 2018, an OWCP hearing representative affirmed in part and set aside in part the May 12, 2017 decision. She found that the opinion of Dr. Shivdasani as the impartial medical examiner (IME) was well-reasoned and sufficient to carry the special weight of the medical evidence with regard to whether appellant sustained cancer causally related to the accepted workplace exposure. The hearing representative found, however, that OWCP failed to ask either Dr. Shah or Dr. Shivdasani to address the cause of appellant’s sinus/respiratory condition. She remanded the case for OWCP to prepare a statement of accepted facts more specifically describing appellant’s exposure to the identified work factors and to refer him for a second opinion examination to determine whether he sustained a sinus or upper respiratory condition due to the accepted work factors.

### **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 period of FECA,<sup>4</sup> that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup> These are the essential elements of each and every

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<sup>4</sup> *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>5</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>6</sup>

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.<sup>7</sup>

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 claimant.<sup>8</sup>

FECA provides that if there is disagreement between an OWCP designated physician and an employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>9</sup> For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."<sup>10</sup> Where OWCP has referred the case to an IME to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.<sup>11</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish metastatic colon cancer causally related to the accepted factors of his federal employment.

The Board initially finds that OWCP improperly determined that a conflict existed between Dr. Howard and Dr. Shah. On August 4 and 24, 2015 Dr. Howard informed appellant that the WTC Health Program had certified that appellant had sustained upper respiratory disease, malignant neoplasm of the rectosigmoid junction, and a secondary malignant neoplasm of the lung as covered for medical treatment. On February 5, 2016 he related that the WTC had accepted appellant's malignant neoplasm of the rectosigmoid and a secondary malignant neoplasm of the lung as due to his WTC exposure based on an opinion of a physician associated with the WTC Health Program, a review of his medical records, and his exposure history. Dr. Howard, however,

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<sup>6</sup> *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>7</sup> *R.M.*, Docket No. 18-0976 (issued January 3, 2019); *P.D.*, Docket No. 17-1885 (issued September 17, 2018).

<sup>8</sup> *H.B.*, Docket No. 18-0781 (issued September 5, 2018).

<sup>9</sup> 5 U.S.C. § 8123(a); see 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

<sup>10</sup> *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

<sup>11</sup> *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

did not render his own opinion regarding causation, but instead summarized the findings by the WTC Health Program physician. Without an independent finding regarding causation, his report is of diminished probative value on the issue of causal relationship.<sup>12</sup>

OWCP referred appellant to Dr. Shah for a second opinion examination. In a report dated July 29, 2016, Dr. Shah advised that it was presently impossible to determine whether his metastatic colon cancer was causally related to his exposure in the vicinity of the WTC around September 11, 2001. She asserted that she was unable to conclude that appellant's colon cancer was "directly aggravated" by employment factors. Dr. Shah further advised, however, that her opinion should not be taken as contradicting the opinion of the WTC physician who found that the condition resulted from his exposure at the WTC. Her opinion on causal relationship is thus equivocal in nature and, consequently, of diminished probative value.<sup>13</sup>

Therefore, at the time of OWCP's referral of appellant to Dr. Shivdasani, the record contained no conflict in medical opinion regarding whether appellant sustained metastatic colon cancer causally related to the accepted employment factors.<sup>14</sup> Dr. Shivdasani's report is thus that of an OWCP referral physician rather than an IME.<sup>15</sup> Even though his report is not entitled to the special weight afforded to the opinion of an IME, it can be considered for its own intrinsic value and can still constitute the weight of the medical evidence.<sup>16</sup>

On April 6, 2017 Dr. Shivdasani reviewed appellant's history of exposure to dust and fumes at the WTC on September 11, 2001 and his subsequent treatment for metastatic colon cancer. He asserted that it was impossible to definitively ascertain whether appellant's cancer resulted from his employment exposure. Dr. Shivdasani noted that studies showing that firefighters exposed to fumes and dust at the WTC had increased cancer rates had a "lack of statistical confidence" in evaluating whether environmental triggers were the causative agent. He advised that he was unable to find with conviction that employment exposure in the vicinity of the WTC caused or aggravated appellant's cancer. Dr. Shivdasani concluded that the evidence was insufficient to show environmental exposure as the likely causative factor to a reasonable degree of certainty. His opinion is based on a proper factual and medical history and he provided rationale for his opinion by explaining that studies were currently insufficient to establish environmental factors as the causative agent for appellant's cancer. Thus, Dr. Shivdasani opinion is entitled to the weight of the medical evidence and establishes that appellant's metastatic colon cancer was not caused or aggravated by the accepted employment exposure.<sup>17</sup>

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<sup>12</sup> See *T.S.*, Docket No. 18-1501 (issued March 4, 2019). Moreover, the findings of other government agencies are not dispositive with regard to questions arising under FECA. See *B.J. (W.H.)*, Docket No. 18-0910 (issued December 21, 2018).

<sup>13</sup> *S.F.*, Docket No. 18-1030 (issued April 5, 2019).

<sup>14</sup> See generally *C.F.*, Docket No. 17-0951 (issued June 11, 2018).

<sup>15</sup> See *R.H.*, Docket No. 17-1477 (issued March 14, 2018).

<sup>16</sup> *Id.*; see also *F.R.*, Docket No. 17-1711 (issued September 6, 2018).

<sup>17</sup> See *R.T.*, Docket No. 17-2019 (issued August 24, 2018).

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 various cancer conditions causally related to the accepted factors of his federal employment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 16, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 18, 2019  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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