

**United States Department of Labor  
Employees' Compensation Appeals Board**

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<b>R.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-0471</b>
	)	<b>Issued: October 7, 2020</b>
<b>TENNESSEE VALLEY AUTHORITY,</b>	)	
<b>COAL &amp; GAS OPERATIONS -- PARADISE,</b>	)	
<b>Drakesboro, KY, Employer</b>	)	
	)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Alexandria Panarelli, Esq.,</i> for the appellant <sup>1</sup>	
<i>Office of Solicitor,</i> for the Director	

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 30, 2019 appellant, through counsel, filed a timely appeal from an August 23, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish a pulmonary condition in the performance of duty, as alleged.

## FACTUAL HISTORY

On December 28, 2018 appellant, then a 68-year-old scrubber operator, filed an occupational disease claim (Form CA-2) alleging that she developed pneumoconiosis, asbestosis, and chronic bronchitis due to factors of her federal employment. She indicated that she first became aware of her condition and realized that it was caused or aggravated by factors of her federal employment on October 11, 2018. Appellant resigned on February 1, 2018.

In answers to referencing FECA Bulletin No. 85-33 “Evidence Required in Support of a Claim for Asbestos-Related Illness” accompanying her claim, appellant recounted that she had worked for the employing establishment since 1982 as an iron worker and was exposed to coal dust and flue gas for eight hours a day, five days a week without a mask. From 1985 to 1986 she worked as a laborer in the power house and was exposed to coal dust, flue gas, and asbestos in insulation which would fall from the steam lines, for eight hours a day, five days a week. Appellant reported seeing dust in the air and on the equipment. From 1986 she worked as an assistant unit operator and was exposed to coal dust, flue gas, and asbestos in insulation that would fall from the steam lines, for eight hours a day, five days a week. Appellant indicated that she saw dust in the air and on the equipment. From 2001 to February 1, 2018 she became a scrubber operator and was exposed to flue gas, limestone, and possibly asbestos that would fall from the pipelines for 12 hours a day, 3 to 4 days a week. Appellant again reported seeing dust in the air and on equipment. She did not wear a mask while performing her various positions. Appellant indicated that prior to the commencement of her federal employment in 1982 she held other jobs in her career, all of which were dust free environments. However, she alleged that all of her federal employment positions exposed her to dust and pollutants. Appellant reported smoking one-half pack of cigarettes per day for 20 years.

On November 12, 2018 Dr. Glen Baker, a Board-certified pulmonologist and certified B-reader, interpreted a September 24, 2018 x-ray as showing parenchymal abnormalities consistent with pneumoconiosis. He determined that a pulmonary function studies (PFS) performed on November 9, 2018 was normal.

In a report dated November 12, 2018, Dr. Baker noted that appellant began working for the employing establishment in 1982 until February 1, 2018, for a total of 26 years. During that time, appellant had exposure to asbestos, coal dust, limestone, and flue gas. Dr. Baker noted that she had a history of smoking one-half pack of cigarettes a day for 20 years, but quit smoking 4 years prior. He discussed appellant’s complaints of shortness of breath and daily cough and sputum production for the past one to two years and noted that a September 24, 2018 x-ray revealed category 1/0 pneumoconiosis with pulmonary asbestosis. Dr. Baker diagnosed occupational pneumoconiosis with pulmonary asbestosis and chronic bronchitis by history. He opined that appellant had x-ray changes of early pulmonary fibrosis from her occupational exposures to asbestos and coal dust. Dr. Baker further found that her chronic bronchitis was also caused by exposure to asbestos and coal dust present in her work environment.

In a development letter dated January 9, 2019, OWCP advised appellant of the factual and medical evidence necessary to establish her claim. It attached a questionnaire for her completion. By separate letter of even date, OWCP also requested additional information from the employing establishment. It afforded both parties 30 days to respond.

By decision dated February 12, 2019, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish the implicated employment factors. It explained that she failed to respond to the development questionnaire. OWCP concluded, therefore, that appellant had not met the requirements to establish that she sustained an injury as defined by FECA.

In a February 5, 2019 statement received by OWCP on February 14, 2019, M.B., a professional industrial hygienist with the employing establishment, indicated that appellant was employed for intermittent periods totaling 35 years from 1982 to 2018. He related that exposure data was unavailable specifically for her, but that general data for coal dust and asbestos at the relevant facilities demonstrates that personal exposures experienced by all workers in the same work environment as she was below all applicable Occupational Safety and Health Administration (OSHA) standards. M.B. further noted that exposures to asbestos at all employing establishment facilities were well under applicable OSHA limits. He asserted that appellant did not perform duties that exposed her to these contaminants. M.B. further noted that it used state of the art respiratory protection, work methods as well as engineering controls to assure workplace exposures are maintained well below the OSHA standards. The employing establishment submitted job descriptions for an assistant unit operator and scrubber operator.

Employing establishment medical records from March 8, 1982 to January 28, 2019 noted treatment for chronic bronchitis, sinusitis, an elbow injury, and a puncture wound. PFS performed at the employing establishment on December 31, 1985 and February 29, 1996 revealed decreased expiratory flows indicative of possible small airway obstruction. The PFS dated January 21, 1987 was normal. A spirometry test conducted on March 1, 2000 revealed possible early state mild obstructive deficiency.

On August 21, 2017 the employing establishment initiated a voluntary reduction-in-force effective February 1, 2018. Appellant resigned from employment effective February 1, 2018.

On February 1, 2018 the employing establishment submitted a verification of employment noting that appellant was employed from March 8, 1992 to February 1, 2018. Also submitted were employee evaluations from 1992 to 1994.

In a statement dated January 28, 2019, W.P., plant manager, controverted appellant's allegations. He indicated that she was provided with various types of respiratory protection and received annual training on the application and proper use of respiratory protective devices. W.P. advised that inhalation protection from dust masks to full face respirators were provided to employees and industrial hygiene/air monitoring tests were conducted annually. He reported that from 2012 to 2018 all, but three samples taken were below detection limits in the laboratory and all three samples that were within detection limits were below the OSHA standards. W.P. stated that there was occasional work within the duties and responsibilities of a scrubber where particulate levels could be elevated including routine inspections and or work involving ash

hoppers, scrubber modules, and hydrated lime systems. He noted that during the last 17 years appellant worked as a scrubber operator which was in a control room environment without documented exposure to asbestos, dust, or flue gas.

On February 19, 2019 appellant requested a telephonic hearing with an OWCP hearing representative.

In a letter dated April 25, 2019, counsel asserted that appellant worked for 36 years at the employing establishment and was exposed to asbestos from the steam lines and boilers, coal dust, limestone dust, and flue gas as the plant used millions of tons of coal during her employment. Counsel further asserted that W.B., the industrial hygienist, confirmed that there was dust exposure at the plant and noted that it was below OSHA standards.

At the telephonic hearing, held on June 11, 2019 appellant described her work duties as an iron worker in 1982 and reported a lot of coal dust in the air. She noted that from 1982 to 2001 no one wore masks and she was not instructed to wear a mask. Appellant was provided protective equipment for the gas plant related to ammonia exposure, but she did not have the occasion to use it.

By decision dated August 23, 2019, an OWCP hearing representative affirmed the decision dated February 12, 2019.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> 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 timely filed within the applicable time limitation period of FECA,<sup>4</sup> that an injury was sustained in the performance of duty as alleged, and that any disability or medical 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 compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>6</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant 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

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<sup>3</sup> *Id.*

<sup>4</sup> *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>5</sup> *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>6</sup> 20 C.F.R. § 10.115; *E.S.*, Docket No. 18-1580 (issued January 23, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.<sup>7</sup>

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.<sup>8</sup> 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>9</sup> Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.<sup>10</sup>

### ANALYSIS

The Board finds that appellant has met her burden of proof to establish employment exposure to dusts and asbestos occurred while in the performance of duty as alleged.

Appellant filed a claim alleging that she developed pneumoconiosis, asbestosis, and chronic bronchitis caused by exposure to dusts and asbestos while working at the employing establishment commencing in 1982.

The record establishes that from 1982 to February 2018, appellant worked as an iron worker (1982 to 1985); a laborer in a power house (1985 to 1986); an assistant unit operator (1986 to 2001); and as a scrubber operator (2001 to 2018) at the employing establishment, with exposure to dusts and asbestos. In her response to FECA Bulletin No. 85-33 “Evidence Required in Support of a Claim for Asbestos-Related Illness” filed with her claim form provided a detailed discussion, including dates, of the various exposures to dusts and asbestos throughout her career with the employing establishment.

The employing establishment’s February 5, 2019 statement from M.B. indicates that appellant was employed for intermittent periods totaling 35 years from 1982 to 2018. He confirmed her exposure to coal dust and asbestos and related that data for coal dust and asbestos at the relevant facilities during this period demonstrated that personal exposures by all workers at TVA were below all applicable OSHA standards. Similarly, appellant’s plant manager, W.P. also confirmed that appellant was exposed to particulates at work noting that there was work of a scrubber where particulate levels could be elevated including routine inspections and or work involving ash hoppers, scrubber modules, and hydrated lime systems. He reported that from 2012 to 2018 all, but three samples taken were below detection limits in the laboratory and all three samples that were within detection limits were below the OSHA standards. Additionally, appellant

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<sup>7</sup> See *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>8</sup> *J.F.*, Docket No. 18-0492 (issued January 16, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>9</sup> *A.M.*, Docket No. 18-0562 (issued January 23, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>10</sup> *E.W.*, *supra* note 4; *Gary L. Fowler*, 45 ECAB 365 (1994).

sought medical care with Dr. Baker on November 12, 2018 who related her account of exposure to asbestos, coal dust, limestone dust, and flue gas beginning in 1982 to 2018 and diagnosed respiratory conditions.

The respiratory injury appellant claims is consistent with the facts and circumstances she set forth, her course of action, and the medical evidence she submitted. The Board finds that this evidence establishes that the alleged exposures to dusts and asbestos occurred as alleged.<sup>11</sup>

As appellant has established the claimed occupational exposures, the question becomes whether these exposures caused an injury.<sup>12</sup> As OWCP found that she had not established employment exposures, it did not evaluate the medical evidence.<sup>13</sup> Thus, the Board will set aside OWCP's August 23, 2019 decision and remand the case for consideration of the medical evidence of record.<sup>14</sup> On remand OWCP shall follow its procedures for developing causal relationship in asbestosis and related claims as set forth in FECA Procedure Manual, Chapter 2.800.9(a)(1). After such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met her burden of proof to establish a pulmonary condition causally related to the accepted employment exposures.

### CONCLUSION

The Board finds that appellant has met her burden of proof to establish that occupational exposure to dusts and asbestos occurred in the performance of duty, as alleged. The Board further finds that the case is not in posture for decision regarding whether she has established a pulmonary condition causally related to the accepted employment exposures.

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<sup>11</sup> See *J.C.*, Docket No. 18-1803 (issued April 19, 2019); *M.C.*, Docket No. 18-1278 (issued March 7, 2019); *M.M.*, Docket No. 17-1522 (issued April 25, 2018).

<sup>12</sup> See *N.B.*, Docket No. 13-0513 (issued August 27, 2017).

<sup>13</sup> See *A.T.*, Docket No. 16-1787 (issued February 1, 2017).

<sup>14</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 23, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 7, 2020  
Washington, DC

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

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

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