United States Department of Labor
Employees' Compensation Appeals Board

B.T., Appellant	)	
and	)	**Docket No. 20-1665**
	)	**Issued: July 2, 2021**
TENNESSEE VALLEY AUTHORITY, COAL & GAS OPERATIONS, WIDOWS CREEK FOSSIL PLANT, Stevenson, AL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 25, 2020 appellant, through counsel, filed a timely appeal from an April 9, 2020 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 the accepted employment exposure.

FACTUAL HISTORY

On January 24, 2019 appellant, then a retired 58-year-old boilermaker,[3] filed an occupational disease claim (Form CA-2) alleging that he developed occupational pneumoconiosis and bronchitis due to factors of his federal employment. He indicated that he first became aware of his conditions and their relation to his federal employment on September 25, 2018.

In a September 25, 2018 letter, appellant notified the employing establishment that he was informed by his physician for the first time that he had an occupational disease that was work related.

In undated responses referencing FECA Bulletin No. 85-33, "Evidence Required in Support of a Claim for Asbestos-Related Illness" accompanying his claim, appellant recounted that he had sporadically worked for the employing establishment at two different plants from April 24, 1981 to December 28, 1991 as a boilermaker and was exposed to coal dust, arsenic and flue gas, and asbestos, as well as welding smoke, welding fumes, and grinding dust for 10 to 12 hours a day, six to seven days a week. He indicated that he saw dust in the air and on the equipment. Appellant only occasionally wore a paper mask while performing his various positions. He noted that, prior to the commencement of his federal employment in 1982, he held other jobs in his career, all of which were dust-free environments. However, appellant alleged that all of his federal employment positions exposed him to dust and pollutants. He reported smoking one pack of cigarettes per day for 40 years. Appellant also noted that he had bronchitis in the past, most recently in 2016, for which he took medication.

In a November 19, 2018 medical report, Dr. Glen Baker, a Board-certified pulmonologist and certified B-reader, related that appellant worked at multiple plants at the employing establishment. During that time, appellant had exposure to asbestos, coal dust, inorganic arsenic, flue gas, and welding fumes. Dr. Baker noted that appellant had a history of smoking one pack of cigarettes a day for 40 years. He discussed appellant's complaints of shortness of breath and daily cough without sputum for the past three to four years and determined that a pulmonary function study (PFS) performed on November 16, 2018 was normal. Dr. Baker noted that the August 28, 2018 x-ray revealed category 1/1 pneumoconiosis. He diagnosed occupational pneumoconiosis and bronchitis. Dr. Baker opined that appellant had x-ray changes of early pulmonary fibrosis from his occupational exposures to asbestos and coal dust. He further found that appellant's bronchitis was also caused by exposures to asbestos and coal dust present in his work environment.

In a development letter dated February 13, 2019, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. In a separate letter of even

[3] The record indicates that appellant stopped working at the employing establishment on December 28, 1991 and retired as a boilermaker from private employment in February 2015.

date, OWCP also requested additional information from the employing establishment. It afforded both parties 30 days to respond.

On March 4, 2019 the employing establishment advised that data of exposure to asbestos and coal dust for appellant was not available because one of the plants that he worked at was no longer in operation and many of the employees were either reassigned or retired. It requested an additional 30 days to respond to OWCP's February 13, 2019 development letter.

On March 13, 2019 the employing establishment disputed appellant's allegations of dust or asbestos exposure and noted that he was employed for approximately 29 months at the employing establishment and four and half months at the Sequoyah Nuclear Plant over a 10-year period. It advised that data of exposure to asbestos and coal dust was still not available, but that assessments for boilermakers as the employing establishment consistently demonstrated that personal exposures experienced by all workers were below occupational exposure limits. The employing establishment indicated that appellant did not perform insulating/abatement duties of asbestos as a boilermaker. It further noted that his position did not routinely require the use of respirators because dust levels were well below Occupational Safety and Health Administration established limits. OWCP also received a position description of appellant's duties as a boilermaker.

On March 20, 2019 OWCP referred appellant, a statement of accepted facts, and a list of questions to Dr. Allan Goldstein, a Board-certified pulmonologist, for a second opinion examination.

In a March 26, 2019 letter, counsel clarified that appellant worked at two different plants at the employing establishment, for three years in total, and this caused him to be exposed to asbestos, coal dust, arsenic and flue gas, fly ash, welding smoke, welding fumes, and grinding dust. She also asserted that there were multiple employees who worked at the employing establishment and had been found to have occupational lung diseases, who were compensated.

In a May 24, 2019 report, Dr. Goldstein noted appellant's employment exposure and symptoms. He conducted a physical examination and reviewed a May 23, 2019 chest x-ray. Dr. Goldstein also reviewed Dr. Baker's November 19, 2018 report and determined that appellant had normal pulmonary functions at the time. He opined that appellant did not have occupational pneumoconiosis. Although Dr. Goldstein acknowledged that he had not seen the August 28, 2018 x-ray mentioned in Dr. Baker's report, Dr. Goldstein explained that if appellant's x-ray improved, then it would be inconsistent with any of the pneumoconiosis. He concluded that there was no evidence that asbestosis was contributing to his respiratory symptoms. Dr. Goldstein opined that appellant's shortness of breath was in large part related to his body stature as well as his smoking.

In a July 24, 2019 supplemental report, Dr. Goldstein noted that he reviewed the August 28, 2018 chest x-ray, which revealed pneumoconiosis. He indicated, however, that the May 23, 2019 chest x-ray revealed normal results. Dr. Goldstein opined that appellant did not have pneumoconiosis. He explained that pneumoconiosis was a scarring disease that could not disappear from an x-ray.

By decision dated August 22, 2019, OWCP denied appellant's occupational disease claim, finding that he had not established causal relationship between his diagnosed pulmonary diseases and the accepted work exposure. It found that Dr. Goldstein's reports dated May 24 and July 24, 2019 established that appellant exhibited no evidence of significant lung disease due to asbestosis or asbestos exposure.

On September 5, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on January 15, 2020. By decision dated April 9, 2020, OWCP's hearing representative affirmed the August 22, 2019 decision, finding that appellant had not established causal relationship between his diagnosed pulmonary conditions and his accepted employment exposure. He accorded the weight of the medical evidence to Dr. Goldstein.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim, including 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 of FECA,[5] 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.[6] 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.[7]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant 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 claimant.[8]

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.[9] The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical

[4] *Supra* note 2.

[5] *J.W.*, Docket No. 18-0678 (issued March 3, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *J.S.*, Docket No.18-0657 (issued February 26, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *L.J.*, Docket No. 19-1343 (issued February 26, 2020); *R.R.*, Docket No. 18-0914 (issued February 24, 2020); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

[9] *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and specific employment factors identified by the employee.[10]

Section 8123(a) of FECA in pertinent part states 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 (known as a referee physician or impartial medical examiner (IME)) who shall make an examination.[11] 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.[12] When there exist opposing reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13]

ANALYSIS

The Board finds that this case is not in posture for decision.

Dr. Baker, in his November 19, 2018 report, reviewed an August 28, 2018 chest x-ray and found category 1/1 pneumoconiosis and opined that appellant's diagnosed occupational pneumoconiosis and bronchitis were causally related to his work exposure.

In his July 24, 2019 supplemental report, Dr. Goldstein agreed that the August 28, 2018 x-ray revealed pneumoconiosis; however, he disagreed with Dr. Baker's assessment and opined that appellant did not have occupational pneumoconiosis causally related to his accepted work exposure. He found that the subsequent chest x-ray performed on May 23, 2019 revealed no abnormality that would otherwise confirm that appellant had pneumoconiosis.

The Board, thus, finds that a conflict in the medical evidence exists between Dr. Baker, appellant's treating physician, and Dr. Goldstein, OWCP's referral physician, with respect to whether appellant has occupational pneumoconiosis as a result of his federal employment.[14] Their reports are of equal probative value.[15] As previously stated, when there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an IME to resolve the conflict in the medical evidence.[16] Consequently, the case must be referred to an IME to resolve

[10] *R.G.*, Docket No. 18-0792 (issued March 11, 2020); *D.J.*, Docket No. 19-1301 (issued January 29, 2020); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[11] *Supra* note 2 at § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

[12] 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

[13] *S.T.*, Docket No. 16-1911 (issued September 7, 2017); *G.B., widow of R.B.*, Docket No. 16-1363 (issued March 2, 2017); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[14] *See D.B.* Docket No. 20-1142 (issued December 31, 2020); *R.P.*, Docket No. 15-1893 (issued February 24, 2016).

[15] *Id.*

[16] *Supra* note 11.

the existing conflict in the medical opinion evidence regarding whether appellant has occupational pneumoconiosis as a result of his federal employment.[17]

On remand OWCP shall refer appellant's case and the complete case record, including the chest x-rays dated August 28, 2018 and May 23, 2019, to an IME, who is a certified B-reader, for resolution of the conflict in accordance with section 8123(a) of FECA and the implementing regulations.[18] Following this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision regarding his claim for an employment-related pulmonary condition.[19]

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2020 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 2, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[17] *Id. See also D.B., supra* note 14.

[18] 5 U.S.C. § 8123(a); *id.*

[19] The Board notes that, while Dr. Goldstein mentioned reviewing the chest x-rays dated August 28, 2018 and May 23, 2019, the record does not contain these reports.