

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

A.F., widow of P.F., Appellant

and

**TENNESSEE VALLEY AUTHORITY,
Chattanooga, TN, Employer**

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**Docket No. 25-0256
Issued: May 19, 2025**

Appearances:

*Jimmy F. Rogers, Jr., Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On March 26, 2024 appellant, through counsel, filed a timely appeal from a September 28, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 her burden of proof to establish exposure to asbestos while in the performance of duty, as alleged.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 19, 2018 the employee, then a 78-year-old former boilermaker/welder, filed an occupational disease claim (Form CA-2) alleging that he sustained mesothelioma causally related to factors of his federal employment. He alleged that he was exposed to asbestos, the only known cause of mesothelioma, in the course of his work for the employing establishment at five different nuclear power plant facilities.

A statement of earnings indicates that the employee worked for the employing establishment from 1976 to 1991. He subsequently worked for private corporations.

In a development letter dated October 24, 2018, OWCP informed the employee of the deficiencies of his claim. It advised him of the type of additional factual and medical evidence needed and provided a questionnaire for his completion. By separate development letter of even date, OWCP requested that the employing establishment provide additional information regarding appellant's occupational disease claim, including comments from a knowledgeable supervisor regarding the accuracy of his statements. It afforded both parties 30 days to respond.

In a November 13, 2018 response, the employing establishment advised that the employee was an "intermittent hourly worker" and requested an extension of time to review his employment records.

Thereafter, OWCP received a September 19, 2017 report from Dr. Nathan Mull, a Board-certified internist, who evaluated the employee for right pleural effusion and dyspnea. Dr. Mull noted that appellant had never smoked, but had a history of significant exposure to asbestos in his work as a boilermaker. He diagnosed a right pleural effusion suspicious for mesothelioma.

In a sworn declaration dated November 21, 2018, the employee advised that he had worked for the employing establishment in five different nuclear power plants from October 20, 1976 to December 16, 1991, except for a few days of lay-off time. He related that from December 17, 1991 to April 23, 2002 he worked as a boilermaker/welder for various contractors usually at the same facilities at the employing establishment. The employee asserted that he worked in other crafts, including insulators, electricians, carpenters, and pipefitters and that he was exposed to a variety of "asbestos-containing products including but not limited to pipe covering/insulation, gaskets, pumps, valves, rope, and packing." He related that he was exposed "continuously throughout each day to asbestos from various sources including operating machinery and all the many tradesman/craftsmen performing their daily labor. The daily work I performed also exposed

³ Docket No. 22-0101 (issued June 1, 2023).

me to the same asbestos.” The employee asserted that he saw visible dust from the asbestos. He noted that a coworker and fellow boilermaker, R.A., had an accepted claim for asbestosis.

On October 23, 2018 the employing establishment controverted the claim. It asserted that the employee worked for the boilermakers’ union more than 44 years and only worked for the employing establishment for 15 years. The employing establishment indicated that it did not have data showing the employee’s exposure to asbestos, but that other workers in the same environment showed exposure levels within occupational exposure limits. The employing establishment again indicated that he had not performed abatement duties.

In a statement dated December 13, 2018, the employing establishment related that the employee’s job did not include “removal or disturbance of asbestos,” that he did not perform asbestos abatement work, and that he was not in an asbestos monitoring program. It maintained that he had subsequent employment with contractors, who performed asbestos abatement work. The employing establishment advised that it required that employees exposed to more than 0.1 fiber/cubic centimeter of asbestos in air for more than 30 days wear a respirator and participate in an asbestos medical surveillance program.

On January 3, 2019 OWCP prepared a statement of accepted facts (SOAF) indicating that the employee was exposed to asbestos-containing products working around boilermakers, welders, insulators, electricians, laborers, carpenters, and pipefitters/steamfitters.⁴ It referred him for a second opinion examination.

In a report dated January 10, 2019, Dr. Mull related that he had evaluated the employee on September 19, 2017 for dyspnea and right lower thoracic pain. He advised that he was “immediately concerned about mesothelioma” due to the employee’s asbestos exposure in his work as a boilermaker. Dr. Mull attributed his pleural mesothelioma to his occupational exposure to asbestos at the employing establishment.

The employee passed away on March 18, 2019. The death certificate listed the cause of death as malignant mesothelioma of the pleura and peritoneum, hypoxic respiratory failure, malignant pleural effusion, and mesothelioma.

On June 24, 2019 OWCP referred the case file to Dr. Ronald R. Cherry, a Board-certified internist and pulmonologist, for a second opinion examination.

In a report dated July 8, 2019, Dr. Cherry noted that the employee had died from a malignant right pleural mesothelioma that had extended into his pericardium. He reviewed the SOAF and Dr. Mull’s finding in his January 10, 2019 report that the employee was exposed to asbestos while working for the employing establishment. Dr. Cherry related that most mesothelioma cases resulted from exposure to asbestos. He asserted that there was “essentially no safe exposure to asbestos dust” and that all exposure to asbestos was “damaging, potentially carcinogenic, and cumulative.” Dr. Cherry found that if the employee’s exposure to asbestos

⁴ OWCP referred the employee for a second opinion examination; however, he was unable to attend the appointment due to health reasons.

including his work for the employing establishment, then his “malignant pleural mesothelioma was caused or accelerated as a result of his federal employment.”

OWCP prepared a SOAF dated August 6, 2019 which noted that the employee was not in a job classification that included the removal or disturbance of asbestos.

By decision dated August 9, 2019, OWCP denied the employee’s occupational disease claim, finding that the evidence of record was insufficient to establish that the alleged exposure occurred as described.

On September 6, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review.

Subsequently, counsel submitted revised standards from the National Institute for Occupational Safety & Health (NIOSH) that noted that excessive risk of cancer had been demonstrated at all asbestos fiber concentrations and that there was no safe level of exposure. NIOSH recommended setting the standard at the lowest level detectable.

In a July 23, 1999 letter, the Occupational Safety and Health Administration (OSHA) advised that it had not set the permissible exposure limits for asbestos below where a significant risk occurred because it could not be reliably measured at that level.

In a sworn declaration dated January 9, 2020, T.R., a coworker, related that he had worked as a boilermaker/welder at the employing establishment’s nuclear power plant from 1982 to 1988 except for an occasional day off. His duties included working around various craftsman that exposed him to asbestos-containing products including “pipe covering/insulation, gaskets, pumps, valves, rope, and packing.” T.R. advised that the products produced visible dust. He related that while welding at the employing establishment’s plant, he often wrapped himself in asbestos blankets to protect against the sparks and worked on boilers that required him to remove the asbestos insulation. T.R. did not receive airway protection until the late 1980s. He also removed asbestos insulation from large tanks and air ducts to work on metal tubes. T.R. indicated that he and the employee worked on different crews, but occasionally worked on the same crew. He related that he had been diagnosed with asbestosis due to his work at the employing establishment and had an approved claim with OWCP. T.R. indicated that he believed that the employee had greater exposure to asbestos than he did because the employee worked at the plant for a longer period of time. He also noted that he did not recall the employee wearing a monitoring device.

In a January 10, 2020 sworn declaration, R.A. advised that he had worked as a boilermaker/welder at various nuclear power plants at the employing establishment from 1976 to 1991 with occasional days off. He described his work around other tradesman and his exposure to asbestos-containing products daily. R.A. related that he had used his bare hands and various tools, including hand grinding tools to remove asbestos insulation from pipes and boilers, which produced thick dust such that he could see his footprints on the ground. He had no airway protection until the mid-1980s. R.A. advised that he worked with the employee at three different nuclear power plants. He related that he had an approved claim with OWCP for medical monitoring due to his asbestosis. R.A. indicated his belief that the employee had more asbestos exposure than he did, because the employee had worked at the employing establishment’s power

plants for a longer period of time. He also noted that he did not recall the employee wearing a monitoring device.

A hearing was held on January 13, 2020.

By decision dated March 30, 2020, OWCP's hearing representative affirmed the August 9, 2019 decision.

In a sworn declaration dated February 25, 2021, appellant asserted that the employee had never worked for asbestos abatement contractors or performed asbestos abatement work either before, during, or after working for the employing establishment. She advised that after he left employment, he worked in maintenance tasks usually at the facilities of the employing establishment.

On March 30, 2021 appellant, through counsel, requested reconsideration.

By decision dated May 3, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Appellant appealed to the Board. By decision dated June 1, 2023, the Board set aside the May 3, 2021 decision, finding that appellant had raised a new and relevant legal argument.⁵ The Board remanded the case for an appropriate merit decision.

By decision dated September 28, 2023, OWCP denied modification of its March 30, 2020 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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, 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.⁷ 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.⁸

In an occupational disease claim, appellant's burden of proof 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

⁵ *Supra* note 3.

⁶ *Id.*

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

⁸ *B.H.*, Docket No. 20-0777 (issued October 21, 2020); *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).

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.⁹

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.¹⁰ 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.¹¹

ANALYSIS

The Board finds that appellant has not established exposure to asbestos while in the performance of duty, as alleged.

The employee, in his November 21, 2018 sworn declaration, indicated that he was exposed to and inhaled visible dust produced by asbestos-containing products. The employing establishment controverted the claim, noting that it did not have data showing the employee's exposure to asbestos; other workers in the same environment showed exposure levels within occupational exposure limits; the employee's job did not include removal or disturbance of asbestos; and that the employee was not in an asbestos monitoring/surveillance program. The employing establishment's statements cast serious doubt on the validity of appellant's claim.¹²

OWCP provided appellant the opportunity to clarify this matter, and she submitted a witness statement from T.R. and R.A., who described their own exposure to asbestos and their assumptions about the employee's exposures. Appellant also submitted a sworn declaration, which indicated that the employee had never worked for asbestos abatement contractors or performed asbestos abatement work either before, during, or after working for the employing establishment. In occupational disease cases in which the claim is not based upon a specific incident, the claimant must submit sufficient evidence to identify fully the particular work conditions alleged to have caused the disease and substantiate exposure to the conditions claimed.¹³ The declarations by T.R., A.R., and appellant do not establish that the employee was exposed to asbestos while in the performance of duty, as alleged.

⁹ *G.J.*, Docket No. 23-0577 (issued August 28, 2023); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

¹⁰ *K.R.*, Docket No. 21-0822 (issued June 28, 2022); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388 (2008).

¹¹ *G.S.*, Docket No. 22-0036 (issued June 29, 2022); *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008).

¹² *A.O.*, Docket No. 18-0588 (issued October 10, 2018).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.8004a (November 2023).

As the evidence of record is insufficient to establish the employee's exposure to asbestos while in the performance of duty, as alleged, appellant has not met her burden of proof.¹⁴

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 established exposure to asbestos while in the performance of duty, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 19, 2025
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹⁴ As appellant did not establish an incident as alleged, the Board need not discuss the probative value of the medical evidence. *See J.K.*, Docket No. 17-0300 (issued August 9, 2017).