

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH W. KRIPP and DEPARTMENT OF JUSTICE,
DRUG ENFORCEMENT ADMINISTRATION, Chicago, IL

*Docket No. 03-1814; Submitted on the Record;
Issued October 3, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained an injury in the performance of duty as alleged.

On July 31, 2002 appellant, then a 45-year-old supervisory special agent, filed an occupational disease claim alleging that he was infected with tuberculosis (TB) as a result of his federal employment:

“My office location is situated in the Federal Building on the 11th, 12th and 13th floors. During my daily activities I [am] required to use the public access elevators to come and go to my office area. During the last three months [Immigration and Naturalization Service] (INS) has placed a processing center within our building requiring immigrants and aliens to gain access to our working environment in high numbers by using our elevators. Regularly, during elevator rides myself and other government employees have observed numerous individuals noticeably ill. Often times, these individuals are coughing freely within the confines of the elevators, spewing and expelling bodily fluids within the compartment.”

Appellant stated that on July 18, 2002 he received the results of a routine TB skin test conducted in conjunction with an employer-mandated physical examination. The results indicated that he had been exposed to active TB. The examining physician recommended an immediate chest x-ray. Although it was determined that appellant's TB was currently dormant, the examining physician advised appellant to seek follow-up medical care from his attending physician.

Appellant stated that the only place he could have been exposed to such a germ was in the elevators at work, where he came into close contact with immigrant and aliens displaying noticeable characteristics of being very ill.

The Office of Workers' Compensation Programs asked the employing establishment for any information on diseased individuals to whom appellant was exposed and whether there were any other cases of TB in his office. The Office asked appellant to submit evidence that he was exposed to someone diagnosed with TB.

On September 11, 2002 appellant replied to the Office's request for additional information. He provided dates that the INS began using his building for processing recent immigrants and he related one incident in particular:

“On one specific elevator ride on or about ... May 13, 2002, in the morning between 9:00 a.m. and Noon, I took an elevator ride that was literally ‘wall to wall’ with people. A large percentage of the occupants were immigrants of Middle Eastern/Asian descent. One person in particular was a woman who was standing next to me who was wearing traditional clothes from her native country. She was noticeably ill displaying all those symptoms I previously mentioned [productive coughs/sneezes, speaking in hoarse tones, sweating, fever, malnutrition, fatigue]. This lady was observed to have a sputum soaked bright blue colored handkerchief, which she occasionally used to cover her mouth. She was repeatedly coughing next to me and you could visibly see saliva floating through the air after each cough. Because she was so close to me some of her expelled fluid actually got on my clothes. After seeing this I could [not] wait to get off the elevator. I can [no]t say for certain this person had TB; however, she was noticeably ill, displaying those outward physical symptoms indicative of a person with TB....”

Appellant stated that he was not exposed to any specific individual known to have TB, but the circumstances were such that a reasonable person could conclude that he was exposed to TB on one of the federal building elevators between May 7 and July 15, 2002.

To support his claim, appellant submitted medical evidence confirming his positive TB skin test. On July 31, 2002 Dr. Daniel J. Pohlman, the employing establishment physician who examined appellant, reported that appellant had a positive reaction to a purified protein derivative (PPD) TB skin test on July 15, 2002 with a size of indurations (palpable swelling) of 9 millimeters. A chest x-ray was normal with no evidence of active TB.

Appellant also submitted a September 6, 2002 report from his family physician, Dr. Robert F. Hubbard:

“Please be advised that I am currently following [appellant] for recent conversion of a PPD. In questioning him about potential exposures he [cites], exposure through the work place, when he travels by elevator with individuals with a variety of probable health concerns. [Appellant] is able to relay one episode of an individual who was coughing prominently with productive cough. As you might know, there are a number of immigrants who use the building in which [appellant] works. There is an increased incidence of TB in those individuals.

“As there has been no other clear exposure by [appellant] this clearly is a likely mechanism for his current illness.

“I hope this provides insight into the likely origin of [appellant’s] conversion to a positive PPD. If any further information is required, please contact me.”

Appellant also submitted general information on TB and a 1998 article from the Centers for Disease Control (CDC) on the increase of TB among foreign-born persons in the United States. The article stated that from 1986 to 1997 the number of TB cases among foreign-born persons in the United States increased from 22 percent of the national total to 39 percent of the national total. “As the percentage of reported TB cases among foreign-born persons continues to increase, the elimination of TB in the United States will depend increasingly on the elimination of TB among foreign-born persons.”

In a decision dated October 4, 2002, the Office denied appellant’s claim on the grounds that he failed to establish fact of injury. The Office found that there was no evidence to verify that appellant was exposed to the TB virus during his employment.

On October 17, 2002 the employing establishment replied to the Office’s request for additional information. Dennis L. Prewitt, Assistant Special Agent, in Charge of the Chicago Field Division, wrote to the Office as follows:

“Based on your request concerning the [w]ork[er’s] [c]ompensation [c]laim filed by [appellant], I have reviewed the submitted reports and the information contained in them. It is my opinion that the claim [appellant] is submitting contains accurate information relative to his workplace exposure from the TB germ. Speaking as a representative of the employing establishment, we are ‘concurring’ in [appellant’s] statement concerning his belief that the exposure to the TB germ took place while [he] was working and using the public elevators in the Federal Building at 230 S. Dearborn Street, Chicago, Illinois. This is the third employee of [the employing establishment] exposed to active TB, while in this federal building facility. We are concerned because of the increased possibilities of exposure to our remaining employees. These concerns have be[en] relayed to the General Services Administration (GSA) building representative concerning the ‘in-house’ processing of recent immigrants at the INS Processing Center located in our building.

“If you should have any further question please do n[o]t hesitate to call me....”

Appellant requested an oral hearing before an Office hearing representative. At the hearing, which was held on April 17, 2003, he testified that in the two to three years since he last tested negative for TB, he was never in a situation where he knowingly was exposed to anybody who had TB, other than in the elevators and hallways of his workplace. Appellant’s representative at the hearing, a supervisory special agent, testified that his firsthand experience in that building was the same as appellant’s, that he saw a lot of people who “do n[o]t seem to be well.” Appellant noted that he had an adverse reaction to prophylactic medication his doctor prescribed. The hearing representative requested that appellant submit a statement from the two

identified coworkers who tested positive for exposure to TB. The hearing representative also requested that the employing establishment submit a statement explaining whether the TB test was a required part of the physical examination because of exposure concerns arising from the INS clients.

Following the hearing, appellant submitted a May 7, 2003 statement from Charles C. Manning, one of the coworkers who tested positive for TB: "I generally do recall that there were times when people who were coughing and obviously sick got off the elevator at the 2nd floor at 230 South Dearborn. However, it would be difficult to describe a specific example." On April 18, 2003 Nixon L. Frederick, the other coworker, stated as follows: "On several occasions we were in elevators with immigrants coughing and sneezing. This was almost an everyday occurrence especially in the winter months."

Appellant also submitted a May 8, 2000 regional news release from the Occupational Health and Safety Administration (OSHA) noting the issuance of willful citations to two INS immigration detention facilities in Houston, Texas, for TB exposure. An employee had complained that INS employees were being exposed to active TB from individuals brought into the INS facilities. Noting that thousands of undocumented individuals are processed through INS detention facilities, the OSHA news release stated: "The CDC has categorized this type of work as high hazard for exposure to TB."

In a decision dated June 6, 2003, the Office hearing representative affirmed the denial of appellant's claim for compensation on the grounds that appellant did not establish an injury occurring in the performance of duty. The hearing representative found that appellant did not work in the type of facility specifically identified by the CDC as a high-risk setting. "The kind of incidental exposure which may have occurred in the elevator or hallway does not constitute a hazard of employment as defined under the [Federal Employees' Compensation] Act and applicable regulations," the hearing representative stated. "Therefore, [appellant's] exposure to TB did not occur within the performance of duty."

The Board finds that appellant sustained an injury in the performance of duty, as alleged.

An employee seeking benefits under the Act¹ has the burden of proof to establish the essential elements of his claim. When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.²

The Office has established special procedures for adjudicating cases of pulmonary TB. FECA Bulletin No. 95-20 (issued June 21, 1995) reiterated and expanded these procedures as follows:

¹ 5 U.S.C. §§ 8101-8193.

² See *Walter D. Morehead*, 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury). See generally *John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

“Background: While the incidence of TB in the general population had been on the decline for several decades, it began to rise again at the end of the 1980’s and continues to increase at the present time. Certain strains now prevalent are resistant to some or all of the drug treatments available.

“These developments have heightened concern among agencies whose employees routinely come into contact with members of groups who have a statistically high risk of having TB. The CDC has identified certain kinds of workplaces to be high risk settings for TB infection. These settings include health care facilities, correctional institutions and drug treatment centers, among others. Employees, who may, therefore, have increased risk of exposure include doctors and nurses in hospitals administered by the Department of Veterans Affairs, agents of the U.S. Marshals Service and workers in the Federal prison system.

“While the Act has long had procedures for addressing cases involving infectious diseases, including TB, it has recently come to our attention that they have not been uniformly followed in all district offices. This problem, along with the need to ensure that we consider the various circumstances under which exposure may occur, have led us to reiterate and expand our procedures in this area.

“Action:

“1. The development letter to claimants for pulmonary diseases other than asbestosis (Exhibit 16 of PM Chapter 2.806) asks for a detailed description of the work-related exposure. This question continues to be valid, but where TB is claimed, it is not necessary to obtain the names of specific persons to whom the employee was exposed. Repeated exposure to populations such as prisoners, hospital patients and IV drug users is sufficient to establish work-related exposure.

“2. Claims Examiners must continue to inquire about nonwork exposure. However, if the claimant and the treating physician deny nonwork-related exposure and work-related exposure has been established, the case should be accepted if evidence of TB infection is present.

“3. If both nonwork-related and work-related exposure are involved, the amount and duration of exposure, as well as the length of time between alleged exposure and emergence of signs or symptoms, must be considered in determining whether the condition is work related (see PM Chapter 2.805.4b(2) for a discussion of this point).

“4. Evidence of TB infection includes a positive TB skin test. Other medical evidence required, as noted in MEDGUIDE Chapter 4.6 includes a chest x-ray, sputum tests and copies of pre-employment physical examinations.

“5. Prophylactic treatment (INH therapy) may be authorized based on a positive skin test, even if the x-ray and/or sputum tests are negative. (If these latter two tests are positive, other forms of therapy will likely be employed as well.)”

From May 7 to July 15, 2002 appellant's duties as a supervisory special agent brought him into repeated close contact with foreign-born persons being processed by the INS Processing Center in his building. According to the May 8, 2000 regional news release from OSHA, the CDC categorizes the processing of immigrants by INS employees as a high hazard for exposure to TB. While appellant was not himself an INS employee and was not responsible for processing immigrants, the opening of an INS Processing Center in his building brought the increased risk of exposure into his work environment. He walked the same hallways and shared the same confined elevator cars as did immigrants, who were noticeably ill with productive coughs. Appellant's September 11, 2002 description of a crowded elevator ride on or about May 13, 2002 graphically illustrates how he encountered this increased risk of exposure in the course of his employment.

Appellant's repeated exposure to the foreign-born persons being processed by the INS Processing Center in his building is sufficient under FECA Bulletin No. 95-20, to establish work-related exposure. Both he and his family physician, Dr. Hubbard, denied nonwork-related exposure. Dr. Pohlman, the employing establishment physician, reported that appellant had a positive reaction to a TB skin test on July 15, 2002 with nine millimeters of induration, though a chest x-ray showed no evidence of active TB. With work-related exposure established, nonwork-related exposure denied and evidence that TB infection was present, the Board finds that appellant's case must be accepted under the Office's special procedures for adjudicating cases of pulmonary TB.³ Appellant has met his burden of proof.

Although the Act does not authorize payment for preventive measures such as vaccines and inoculations, the Office can authorize treatment for conversion of tuberculin reaction from negative to positive following exposure to TB in the performance of duty. Regulations implementing the Act expressly provide that the Office may authorize appropriate therapy in this situation.⁴ As noted above, FECA Bulletin No. 95-20 states that prophylactic treatment may be authorized based on a positive skin test. The Board will reverse the denial of appellant's claim and will remand the case for appropriate benefits, including such treatment or therapy as the Office may authorize.

³ Further supporting acceptance of appellant's claim are Dr. Hubbard's September 6, 2002 opinion that appellant's exposure to immigrants at work was clearly a likely mechanism for his current illness and the fact that two of appellant's coworkers, working in the same environment, also tested positive for exposure to TB.

⁴ 20 C.F.R. § 10.313(c) (1999).

The June 6, 2003 decision of the Office of Workers' Compensation Programs is reversed.
The case is remanded for further action consistent with this opinion.

Dated, Washington, DC
October 3, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member