United States Department of Labor
Employees' Compensation Appeals Board

Z.C., Appellant	)	
and	)	**Docket No. 06-1791**
	)	**Issued: December 21, 2006**
DEPARTMENT OF VETERANS AFFAIRS, BAY PINES VETERANS ADMINISTRATION MEDICAL CENTER, St. Petersburg, FL, Employer	)	

Appearances:
Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 25, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 2, 2006, denying her occupational injury claim. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof in establishing that she sustained an injury causally related to factors of her federal employment.

FACTUAL HISTORY

On March 30, 2004 appellant, then a 43-year-old nurse, filed an occupational disease claim. In a narrative statement, she alleged that on December 4, 2003 she experienced an exacerbation of her asthmatic condition after being exposed to smoke at the employing establishment. On that date, welding was being performed in the x-ray unit next door to

appellant's work location. Smoke from the welding allegedly saturated her work area and the adjacent hallway for approximately one and a half hours. On December 5, 2003 appellant was unable to speak. She experienced strong asthma episodes on December 6, 2003. Appellant first sought treatment on December 9, 2003. Following several asthma attacks, she was hospitalized on February 11, 2004, when she stopped working.

An undated report of contact reflected that, on the evening of December 3, 2003, cutting torches were used to remove a wall in the radiology area of the employing establishment. Although some smoke was reportedly generated, the smoke purge system of the fire alarm was activated by project personnel on site to ensure the air quality of the area. Rodney Ream, safety specialist for the employing establishment, stated that "some smell was generated by this activity." He inspected all work and surrounding areas and did not observe any smoke, other than in the immediate work area.

On April 1, 2004 Catherine Cramer of the employing establishment controverted appellant's claim. She contended that the smoke generated by the welding job was not significant enough to exacerbate appellant's asthma. Moreover, smoke was not present in the patient areas.

The employing establishment submitted a March 31, 2004 report from a Dr. Thomas Sutton. After reviewing the documentation, Dr. Sutton opined that there was nothing more dangerous than a mild smell generated around appellant's workplace, in that the smoke purge system cleared the air. He concluded that the worsening of appellant's asthma condition was undoubtedly due to her underlying condition that was well known to have intermittent episodes of exacerbation.

In a report dated February 17, 2004, Dr. Leonard Y. Cosmo, a Board-certified internist, provided a diagnosis of asthma exacerbation secondary to chemical bronchitis. Noting that, beginning January 19, 2004, he had treated appellant on five occasions, Dr. Cosmo stated that appellant had been exposed to some welding gas and fumes which had entered an air conditioning system at work. As a result of this exposure, she experienced shortness of breath, coughing and chest congestion. Pulmonary function tests showed obstructive airflow limitation.

On April 9, 2004 the Office notified appellant that the information submitted was insufficient to establish that she actually experienced the incident alleged to have caused her condition, namely that she was actually exposed to smoke. It provided appellant 30 days to submit additional evidence, including witness statements and reasons why she delayed in filing her claim.

In response to the Office's request, appellant submitted a narrative statement dated April 24, 2004. She indicated that the correct date of injury was December 3, 2003. Appellant stated that there were several witnesses to the incident, including an employing establishment police officer who responded to her complaint; a respiratory therapist who left the premises because he was asthmatic; and several coworkers, including Vicky Spillson, Kathy Sirianni and Aimeed Acevedo. She stated that smoke entered her work area through the ventilation system. When appellant tried to escape from her workplace, she discovered that the smoke had saturated the hallway as well. The filing of her claim was delayed because the employing establishment

misplaced her first claim form. Appellant delayed seeking medical treatment because she was working and she had to wait for an appointment. She stated that she had been asthmatic since 1990 and usually suffered asthmatic episodes once a year.

Appellant submitted a December 4, 2003 progress note bearing an illegible signature, reflecting that she was treated at Bloomingdale Medical Associates for exacerbation of an asthma condition. A March 25, 2004 disability slip bearing an illegible signature indicated that appellant was disabled from performing her work duties. Emergency room progress notes dated December 9 and 10, 2003 signed by Dr. Jeffrey P. Hayyard, a treating physician, provided an assessment of asthmatic bronchitis. The notes reflected that exposure to welding smoke on December 5 or 6, 2003 caused asthmatic wheezing and throat irritation that seemed to worsen each day.

By decision dated May 24, 2004, the Office denied appellant's claim, finding that the evidence submitted did not establish that she had sustained an injury as alleged, namely that she had been exposed to smoke.

On June 2, 2004 appellant requested an oral hearing. In a February 11, 2005 memorandum, appellant's representative alleged that he had been unable to obtain copies of the accident report because the employing establishment had refused to provide the appropriate release forms. The record contains several requests for release of information relating to the December 3, 2003 incident, including: an undated HIPAA authorization form; a June 2, 2004 authorization for release of medical and wage information; and July 21 and August 24, 2004 letters to the records custodian requesting a copy of the report. On September 1, 2004 Rosa Sligh, Supervisor of Release of Information at the employing establishment, informed appellant's representative that he had not submitted adequate authorization for the requested information. On September 7, 2004 appellant's representative again requested release of information relating to the December 3, 2003 incident. The letter contained an authorization signed by appellant. Unsigned notes from Dr. Cosmo reflected that, on or about December 9, 2003, appellant was exposed to smoke in the workplace. Welding fumes and smoke reportedly entered the air conditioning system, causing her work unit to fill with smoke.

Appellant submitted a December 23, 2004 witness statement from Ms. Acevedo, R.N., a coworker. Ms. Acevedo reported that on December 3, 2003 she had observed smoke coming from the ventilation system at the employing establishment in the unit where appellant was working. She left the work site and discovered that the source of the smoke was the x-ray department, where welding was being performed. When Ms. Acevedo returned to appellant's work site, the room and the hallway were "engulfed and saturated with white, milky smoke." The incident was immediately reported to the nursing supervisor, Mr. Hall. After the situation was reported to him, the Veterans Administration (VA) Federal Protective Service police officer came to the area and witnessed the smoke. Ms. Acevedo observed that appellant was having difficulty breathing due to smoke inhalation as she cared for her patients during this period. She also heard a respiratory therapist state that he had to leave the area because he was asthmatic and could not stand the smoke. On December 4, 2003 Ms. Acevedo noted that appellant had lost her voice.

At the February 15, 2005 hearing, appellant testified that she was exposed to smoke for approximately one half to one hour on December 3, 2003. After the exposure, she lost her voice and had trouble breathing. In addition to her asthma attacks, she experienced a partially collapsed lung due to the chemical exposure. The hearing representative asked that the employing establishment provide him with all reports relevant to the December 3, 2003 incident within two weeks. He also asked appellant to provide all medical records from Dr. Cosmo and Bloomingdale Medical Associates showing that she had approximately one asthma attack per year prior to December 3, 2003.

Appellant submitted numerous medical reports. January 15, 2004 medical records from Brandon Hospital emergency room reflected a diagnosis of intrinsic asthma with acute exacerbation. Unsigned triage notes reflected that appellant was treated for asthma which "started out with welding smoke inhalation." Unsigned notes from Dr. Cosmo, dated February 18, 2002, reflected complaints of shortness of breath, coughing and asthma and provided an assessment of bronchial asthma. Appellant submitted physicians' reports, blood test results and x-ray reports from Bloomingdale Medical Associates for the period March 20, 2003 through April 1, 2005, reflecting treatment for conditions including stress, depression, sinusitis, back and joint pain. Notes dated January 12 and April 21, 2004 signed by Ann T. Tran, a physician's assistant, reflect that appellant experienced an exacerbation of her asthma due to welding smoke.

On March 14, 2005 Catherine Cramer contended that the evidence was insufficient to support appellant's allegation that she was exposed to smoke on December 3, 2003.

The record includes daily logs signed by Peter Uhlig for work performed on the building shell addition at the employing establishment. The daily log for December 3 and 4, 2003 reflected that some smoke entered the building during the cutting of steel plates. The building was purged successfully and no smoke detectors were set off. Mr. Uhlig attempted to drape plastic over the exposed south wall; however, since the cutting torch was still being used, he was unable to secure the plastic. The daily log for December 4, 2003 reflected that the portions of the building that were exposed had been covered by plastic.

The employing establishment submitted a March 1, 2005 report from Steve O'Keefe, director of safety and emergency management. After reviewing the events surrounding the incident, Mr. O'Keefe stated that, on December 3, 2003, the Engineered Smoke Control System was activated in the construction area where a crew was cutting steel plates. The system "immediately cleared the entire smoke zone in the interstitial space, of any smoke, *e.g.*, smoke could not migrate to the other surrounding zones," as evidenced by the fact that no smoke detectors were activated.

By decision dated April 12, 2005, the Office hearing representative affirmed the Office's May 24, 2004 decision denying appellant's claim, finding that the evidence failed to establish that the event occurred at the time, place and in the manner alleged.

On March 29, 2006 appellant, by her representative, requested reconsideration of the April 12, 2005 decision. She submitted duplicate reports from Brandon Hospital and Bloomingdale Medical Associates. Appellant also submitted unsigned notes from Dr. Cosmo for

the period January 19, 2004 through March 2, 2005 reflecting his treatment of appellant for chemical bronchitis with asthma exacerbation, as well as other medical conditions.

By decision dated May 2, 2006, the Office denied appellant's request, finding the evidence insufficient to warrant modification of its April 12, 2005 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing 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 the Act, that the claim was timely filed within the applicable time limitation period of the Act[2] and that an injury was sustained in the performance of duty.[3] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged by a preponderance of the reliable, probative and substantial evidence.[5] An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances, and his or her subsequent course of action. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether he or she has established a *prima facie* case.[6] However, an employee's statement alleging that an injury

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989).

[3] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[4] *Delores C. Ellyett*, 41 ECAB 992 (1990). *See generally John J. Carlone*, 41 ECAB 354 (1989); *see also* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (1999) (occupational disease or illness and traumatic injury defined). *See Victor J. Woodhams*, 41 ECAB 345 (1989) regarding a claimant's burden of proof in an occupational disease claim.

[5] *Charles B. Ward*, 38 ECAB 667 (1987).

[6] *Merton J. Sills*, 39 ECAB 572, 575 (1988).

occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[7]

The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[8] The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[9] The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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.[10]

ANALYSIS

The Office found in its May 2, 2006 decision that the evidence of record failed to support that the claimed event occurred as alleged. The factual evidence, however, establishes appellant's occupational exposure to smoke on December 3, 2003. Therefore, the Board finds that this case is not in posture for a decision and must be remanded to the Office for an analysis of the medical evidence.

As appellant's alleged injury occurred in a single workday, the Office properly analyzed her claim as a traumatic injury claim.[11] The record reflects that appellant was working in her capacity as a nurse at the employing establishment on December 3, 2003. It is uncontroverted that, on that date, in the x-ray unit next to appellant's work area, workers were engaged in a construction project that involved the cutting of steel plates. Appellant alleged that smoke from the welding saturated her work area and the adjacent hallway, and that her exposure to this smoke exacerbated her asthmatic condition. Ms. Acevedo, a coworker, corroborated appellant's claim and reported that smoke came through the ventilation system in the unit where appellant was working from the x-ray department, where the welding was being performed. She stated that the workroom and the hallway were "engulfed and saturated with white, milky smoke."

[7] *Thelma S. Buffington*, 34 ECAB 104 (1982).

[8] *See John J. Carlone*, *supra* note 5 at 357.

[9] *Id*

[10] *Id.*

[11] A traumatic injury is defined as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. *See* 20 C.F.R. § 10.5(ee). An occupational disease or illness, on the other hand, means a condition produced by the work environment over a period longer than a single workday or shift. *See* 20 C.F.R. § 10.5(q).

Ms. Acevedo further indicated that the incident was immediately reported to the nursing supervisor, and that the VA Federal Protective Service police officer came to the area and witnessed the smoke. She observed that appellant was having difficulty breathing due to smoke inhalation as she cared for her patients during this period, and on December 4, 2003 appellant had lost her voice. Medical evidence of record is consistent with appellant's reported history of injury. December 4, 2003 progress notes reflect that she was treated at Bloomingdale Medical Associates for exacerbation of an asthma condition. Emergency room progress notes dated December 9 and 10, 2003 signed by Dr. Jeffrey P. Hayyard, provided an assessment of asthmatic bronchitis. The notes reflected that exposure to welding smoke caused asthmatic wheezing and throat irritation that seemed to worsen each day. Dr. Cosmo provided a diagnosis of asthma exacerbation secondary to chemical bronchitis. He stated that, as a result of exposure to some welding gas and fumes which had entered an air conditioning system at work, appellant experienced shortness of breath, coughing and chest congestion. Although none of these reports constitutes a rationalized medical opinion, the consistency of the reports supports the fact that appellant was exposed to welding smoke.

The employing establishment controverted appellant's claim, contending that the smoke generated by the welding job was not significant enough to exacerbate appellant's asthma. However, the evidence presented by the employing establishment serves to establish the fact that appellant was exposed to smoke fumes on December 3, 2003. Rodney Ream, safety specialist for the employing establishment, stated that, although some smoke was reportedly generated by the welding, the smoke purge system of the fire alarm was activated by project personnel on site to ensure the air quality of the area. He personally inspected all work and surrounding areas, and did not observe any smoke, other than in the immediate work area. This reflects that smoke was generated in an amount sufficient to activate the smoke purge system. Mr. Uhlig's December 3 and 4, 2003 daily log for work performed on the building shell addition, reflected that some smoke entered the building during the cutting of steel plates. He attempted to drape plastic over the exposed south wall; however, since the cutting torch was still being used, he was unable to secure the plastic. Although Mr. Uhlig noted that the building was purged successfully and no smoke detectors were set off, the fact remains that smoke fumes entered the building where appellant worked.

The remaining evidence submitted by the employing establishment is insufficient to refute appellant's factual allegations.[12] Mr. O'Keefe, director of safety and emergency management, stated that the Engineered Smoke Control System was activated in the construction area where a crew was cutting steel plates, and that the system "immediately cleared the entire smoke zone in the interstitial space, of any smoke, *e.g.*, smoke could not migrate to the other surrounding zones," as evidenced by the fact that no smoke detectors were activated. There is no evidence that Mr. O'Keefe was actually present at the time smoke was allegedly released at the work site, or that the presence of welding smoke in the hall or in appellant's work area would have activated smoke detectors. Without data as to the exact type and amount of smoke required to activate a smoke alarm, as well as a certification that the smoke alarms were in working order, Mr. O'Keefe's opinion is not determinative. The employing establishment submitted a March 31, 2004 report from a Dr. Sutton, who opined that there was nothing more dangerous

[12] *Thelma S. Buffington*, 34 ECAB 104 (1982).

than a mild smell generated around appellant's workplace. He stated that the worsening of appellant's asthma condition was undoubtedly due to her underlying condition, that was well known to have intermittent episodes of exacerbation. Dr. Sutton did not examine appellant and did not address when the smoke purge system cleared the air, or how long and to what degree appellant may have been exposed to the welding smoke before the air was purged.

Based on the evidence of record, the Board finds that appellant was exposed to welding smoke fumes on December 3, 2003. Therefore, the Board finds that the first component of fact of injury is established. The question remains as to whether appellant's occupational exposure caused an injury. In the instant case, appellant submitted medical evidence which contained a diagnosed condition and an opinion on the issue of causal relationship. However, in light of its ruling on the fact of injury, the Office did not analyze the probative value of the medical evidence. Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.[13] While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[14] This case will be remanded to the Office for an analysis of the medical evidence. After such further analysis and development of the case record as the Office deems necessary, a *de novo* decision shall be issued in order to protect appellant's rights of appeal.

CONCLUSION

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

[13] *Richard Kendall*, 43 ECAB 790, 799 (1992).

[14] *William J. Cantrell*, 34 ECAB 1223 (1983).

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development in accordance with this decision of the Board.

Issued: December 21, 2006
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board