United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
and	)	**Docket No. 07-526**
	)	**Issued: June 8, 2007**
TENNESSEE VALLEY AUTHORITY, DRAKESBORO KENTUCKY FOSSILE OPERATIONS PARADISE, Chattanooga, TN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2006 appellant timely appealed a July 11, 2006 merit decision of the Office of Workers' Compensation Programs denying his occupational disease claim and a November 22, 2006 nonmerit decision finding that he had abandoned his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty causally related to factors of his federal employment; and (2) whether the Office properly determined that he had abandoned his hearing request.

FACTUAL HISTORY

On November 27, 2004 appellant, a 52-year-old retired laborer, filed an occupational disease claim alleging pulmonary emphysema resulting from exposure to coal and flue gases while employed by the employing establishment. He stated that he first realized that his condition was employment related in April 2003.

On November 16, 2005 the Office requested that appellant submit additional evidence including a detailed description of the employment activities he believed contributed to his pulmonary condition. The Office also instructed him to submit a comprehensive medical report addressing the cause and extent of the claimed pulmonary condition and an explanation of whether and how such exposure in the employing establishment contributed to his condition.

On January 10, 2006 the Office received a letter from appellant and a copy of a January 30, 2004 rating decision from the Department of Veterans Affairs, which listed a 10 percent disability for chronic obstructive pulmonary disease.

On January 20, 2006 the Office conducted a conference call with appellant to clarify his work history and the agents to which he was exposed. Appellant noted working for the employing establishment from 1978 to 1981 and, thereafter, intermittently through 1988. Following further development of the claim, the Office determined that a referral to a pulmonologist for a second opinion was necessary. By letter dated April 3, 2006, the Office stated that it was referring appellant, along with a statement of accepted facts, list of questions and the medical file, to Dr. Kenneth Anderson, a pulmonologist. In an April 25, 2006 report, Dr. Anderson reviewed the statement of accepted facts with appellant and noted that he reported a 30-year smoking history of about a half pack of cigarettes per day. Physical examination and objective testing findings were provided. He provided an impression of early chronic obstructive pulmonary disease, with symptoms consistent with chronic bronchitis with a history of and continuation of tobacco abuse and an abnormal chest x-ray consistent with early findings of asbestosis. Dr. Anderson advised that while appellant's chest x-ray demonstrated early findings of asbestosis, the pulmonary function tests did not corroborate those findings as they were most consistent with appellant's known tobacco abuse. He opined that it would be "impossible" to say what degree of appellant's "early abnormal chest x-ray" was secondary to his employment at the employing establishment versus his employment with a private company from 1989 to 1994 as a laborer paving concrete and shoveling coal spills. Copies of objective testing were provided.

By decision dated July 11, 2006, the Office denied appellant's claim, finding that he failed to establish that he sustained an injury in the performance of duty. The Office found that, while he had the exposure claimed, the medical evidence provided did not establish that the claimed condition resulted from the accepted events.

On July 19, 2006 appellant requested an oral hearing by way of a teleconference. In a notice dated October 4, 2006, the Office informed appellant that a telephonic hearing on his claim would be held on November 6, 2006. He was advised to call the toll free number provided at the scheduled hearing time and to enter the pass code provided when prompted. Appellant did not appear for the telephonic hearing.

By decision dated November 22, 2006, the Office determined that appellant had abandoned his request for a hearing. It noted that he failed to appear for the scheduled telephonic hearing on November 6, 2006 and had not contacted the Office either before or after the scheduled hearing to explain his failure to appear.

LEGAL PRECEDENT -- ISSUE 1

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, that an injury was sustained in the performance of duty as alleged and that any disability and specific condition for which compensation is claimed is causally related to the employment injury. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[2]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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.[3]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[4] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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.[5] Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the

[1] 5 U.S.C. §§ 8101-8193.

[2] *Gary J. Watling*, 52 ECAB 357 (2001).

[3] *Solomon Polen*, 51 ECAB 341 (2000).

[4] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[5] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[6]

ANALYSIS -- ISSUE 1

The employing establishment did not dispute that appellant was exposed to coal and flue gases and the Office found that he was exposed to such factors. However, there is no medical evidence documenting an employment-related medical condition.

In this case, appellant did not provide the required medical evidence necessary to establish his claim for compensation benefits under the Act.[7] The rating decision from the Department of Veterans Affairs does not establish that the claimed condition resulted from the accepted events.[8]

The Office also further developed the medical evidence and referred appellant to Dr. Anderson who examined appellant and reviewed test results and he found that testing revealed that appellant's condition was most consistent with appellant's known tobacco abuse. He indicated that it would be "impossible" to say what degree of appellant's "early abnormal chest x-ray" was secondary to his employment as opposed to other factors such as his employment in private industry.

Accordingly, appellant has failed to establish that he sustained an injury in the performance of duty as the medical evidence does not support that exposure to employment factors caused or aggravated a diagnosed condition.

LEGAL PRECEDENT -- ISSUE 2

With respect to hearing requests, Chapter 2.1601.6(e) the Office's procedure manual provides in relevant part:

> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled hearing request.
>
> "Under these circumstances, [the Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [district Office].

[6] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[7] *See Richard A. Weiss*, 47 ECAB 182 (1995).

[8] Findings of other administrative agencies are not dispositive of proceedings under the Act, which is administered by the Office and under Board review, where such findings are made pursuant to different standards of proof. *Michael A. Deas*, 53 ECAB 208 (2001).

"(2) However, in any case where a request for a postponement has been received, regardless of any failure to appear for the hearing, [the Branch of Hearings and Review] should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

"This course of action is correct even if [the Branch of Hearings and Review] can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[9]

ANALYSIS -- ISSUE 2

In finding that appellant had abandoned his July 19, 2006 request for a hearing the Office noted that a telephonic hearing had been scheduled for November 6, 2006. The record shows that the Office mailed appellant appropriate notice of the hearing to his last known address. He received written notification of the hearing 30 days in advance, but failed to telephone the hearing representative as instructed. The record contains no evidence that appellant contacted the Office to reschedule the hearing or explain his failure to participate in the scheduled telephonic hearing.

The Board finds that the record contains no evidence that appellant requested postponement of the hearing. Appellant failed to participate in the scheduled hearing and did not provide any notification of such failure within 10 days of the scheduled hearing. As the circumstances of this case meet the criteria for abandonment as provided in Chapter 2.1601.6(e) of the Office's procedure manual, the Board finds that appellant abandoned his request for an oral hearing.

CONCLUSION

The Board finds that appellant failed to establish that his pulmonary condition was sustained in the performance of duty. The Board further finds that the Office properly determined that he abandoned his request for an oral hearing.

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearing and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999); *see also Claudia J. Whitten*, 52 ECAB 483 (2001); 20 C.F.R. § 10.622.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 22 and July 11, 2006 are affirmed.

Issued: June 8, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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