United States Department of Labor
Employees' Compensation Appeals Board

F.O., Appellant	)	
and	)	**Docket No. 08-442**
	)	**Issued: July 16, 2008**
DEPARTMENT OF VETERANS AFFAIRS, SEPULVEDA VETERANS AFFAIRS MEDICAL CENTER, Sepulveda, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 3, 2007 appellant filed a timely appeal from a September 4, 2007 merit decision of the Office of Workers' Compensation Programs that denied his occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he developed an occupational disease in the performance of duty.

FACTUAL HISTORY

On January 8, 2007 appellant, then a 51-year-old housekeeping aid, filed an occupational disease claim alleging that he developed breathing difficulties and a possible respiratory condition in the performance of duty. He first realized his condition on August 31, 2006.

Appellant stopped work on November 7, 2006, but returned on November 10, 2006. He attributed his breathing difficulties to use of chemicals in the work area.

In a March 20, 2007 statement, appellant explained that he first noticed symptoms approximately one year after beginning his employment and that the onset of his symptoms coincided with the employing establishment's change in cleaning products. He stated that, during his first year of tenure, he worked with 3M cleaning products and noticed no adverse effects. However, the employing establishment then began to use Wex-Pro cleaning products and appellant began to notice symptoms of respiratory irritation. Appellant explained that his exposure occurred while working in designated cleaning areas, particularly in restrooms, where cleaning was intensive and repetitive. His symptoms included a sudden chest pain, a rash, coughing, shortness of breath and an asthma attack.

On March 2, 2007 the Office advised appellant of the type of evidence needed to establish his claim and it requested that the employing establishment provide available information on potentially harmful substances in appellant's work environment.

Appellant provided medical records from his health maintenance organization. These included an August 24, 2006 report from Dr. Martin Weiss, a Board-certified internist, who stated that appellant had a six-month history of a dry cough that began at the same time new chemicals were used at work. Dr. Weiss noted that pulmonary function testing suggested possible mild obstruction with mild hyperinflation. In an October 6, 2006 report, Dr. Silverio Santiago, a Board-certified internist, noted an impression of "no acute disease" but indicated that appellant had likely reactive airway disease from chemical use. On November 7, 2006 Dr. Lynnette Tatosyan, an osteopath, advised that appellant attributed his respiratory symptoms to chemical inhalation at work. She noted that appellant worked around a variety of chemicals, including phenolic acid and recommended that he change jobs to avoid chemical exposure. A November 11, 2006 radiology report noted that chest x-rays showed no evidence of acute cardiopulmonary disease. On November 13, 2006 Dr. David A. Buch, an emergency room physician, noted appellant's symptoms of shortness of breath and cough and diagnosed asthma. Appellant attributed his symptoms to workplace chemical exposure. On November 14, 2006 Dr. Vijayanti K. Reddy, a Board-certified internist, diagnosed asthma exacerbation secondary to chemical exposure. He stated that appellant had been exposed to new chemicals at work, which he described as having strong odors and triggering his breathing difficulties. Dr. Reddy noted that appellant would stop work effective November 27, 2006, "to avoid exposure to chemicals."

On November 20, 2006 Dr. Andrea L. Green, a Board-certified internist, diagnosed asthma and noted that appellant had worked various jobs and also had asbestos exposure while serving in the Navy. In a December 15, 2006 report, Dr. Kumar N. Kulkarni, a Board-certified allergy and immunology specialist, noted appellant's symptoms of congestion and clear rhinirrhea, nocturnal wheezing and shortness of breath. He diagnosed allergic rhinitis, wheezing and persistent asthma. Dr. Kulkarni explained that appellant worked in housekeeping and was exposed to chemicals including ammonium chloride, hydroxyacatic acid, malic acid, benzyl chlorophenol and phenylphenol. He noted that appellant was currently exposed to other chemicals but did not have a list identifying his exposures. Dr. Kulkarni stated that appellant tested positive for allergies to all local grass, tree and weed pollens, cockroach antigen and dust mite molds. On December 28, 2006 Dr. Juan Francisco Moscoso, a Board-certified

otolaryngologist, diagnosed asthma and noted that appellant had no symptoms before beginning work with volatile chemicals for the employing establishment.[1] On January 18, 2007 Dr. Green indicated that appellant had asthma which "appears to be exacerbated by his present work environment." She recommended that appellant avoid chemical exposure. In an undated note, Dr. Green stated that appellant must eliminate exposure to inhaled chemicals and requested that the employing establishment modify his duties to help him control his asthma. On January 19, 2007 Dr. Michael Littner, a Board-certified internist and pulmonary disease specialist, diagnosed apparent occupational asthma, allergic rhinitis, and gastroesophageal reflux disease. He noted that appellant should avoid chemical solvents at work. In a note on the same day, Dr. Green noted that appellant reported feeling better and taking precautions to avoid chemicals at work.

On March 27, 2007 the Office received materials safety data sheets for the products appellant used while cleaning at work. These included data sheets for 3M products as well as Wex-Pro.

On March 29, 2007 Dr. Green advised that appellant's asthma condition was chronic. In an April 26, 2007 note, she advised that appellant had an asthma exacerbation on April 25, 2007 and presented to an emergency room. On May 8, 2007 Dr. Green noted that she performed a bronchoscopy test and found normal results. In a May 11, 2007 report, Dr. Wayneinder Anand, a Board-certified internist, stated that appellant presented for evaluation of "occupational induced hyper-reactive airway disease." He stated that appellant reported that his exacerbations were related to chemicals he used at work. Dr. Anand stated that he educated appellant on the importance of changing jobs as "the chemical is likely playing a role."

Appellant also provided a position description for his job as a housekeeping aid. The description noted that the incumbent may be exposed to harsh chemicals and irritations from cleaning agents. Other irritating agents included dust, dirt and contagious diseases.

On August 2, 2007 the Office referred appellant to Dr. Richard L. Lubman, a Board-certified internist and pulmonary disease specialist, for a second opinion regarding whether appellant had a medical condition causally related to his employment.

In an August 25, 2007 report, Dr. Lubman noted appellant's history of asthma with an onset reported to coincide with the employing establishment's change in cleaning product supplier from 3M to Wex-Pro. He explained that, subsequent to the change, appellant developed a rash, cough and dyspnea and was diagnosed with occupational asthma and severe allergies. On examination, Dr. Lubman found no chest abnormalities, normal sinuses and normal bronchoscopy. He explained that, while laboratory evidence establishing appellant's condition was "sparse," there was significant clinical evidence to support the diagnosis of occupational asthma. Dr. Lubman also noted that appellant "gives a compelling history of symptoms related to his work environment" and noted that appellant's condition seemed to improve when he took time off and worsen when he returned to work. He concluded that appellant's diagnosis of asthma was established. However, Dr. Lubman was unable to determine the causation of appellant's asthma. He noted that appellant attributed his condition to his workplace chemical exposure but explained that there were no components in the Wex-Pro system, which were not

[1] Dr. Moscoso advised that appellant was a former light smoker who stopped smoking "several years ago."

also present in the 3M system, that were known to cause asthma or other respiratory toxicity. Dr. Lubman recommended that appellant avoid workplace chemical exposure because cleaning products generally were known to cause increased risk of developing occupational asthma "and the specific sensitizing or causative agent may not be immediately apparent." However, he cautioned that a direct causal link could not be shown for appellant's occupational asthma. Dr. Lubman stated that aggravation of appellant's asthma was "assumed to occur from an irritant or toxin encountered in the workplace, although … the specific noxious substance or substances cannot be identified with certainty." He opined that appellant had a brief period of total disability due to his acute exacerbation of the work-related condition in late 2006. Dr. Lubman advised that appellant was no longer totally disabled but would benefit from a change in his type and place of work. In an August 27, 2007 work capacity evaluation, he noted that was currently taking medication for his asthma, but the medication may be less effective if he is required to return to his present work environment. Dr. Lubman diagnosed "occupational asthma exacerbated by workplace exposure" and noted that appellant was restricted from exposure to airborne particles, gas and fumes.

By decision dated September 4, 2007, the Office denied appellant's claim on the grounds that appellant had not established a causal relationship between a diagnosed condition and a specific employment factor.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.[3] 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.[4]

An occupational disease or injury is one caused by specified employment factors occurring over a longer period than a single shift or workday.[5] The test for determining whether appellant sustained a compensable occupational disease or injury is three-pronged. To establish the factual elements of the claim, appellant must submit: "(1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the factors identified by the claimant were the proximate cause of the condition for which compensation is

[2] 5 U.S.C. §§ 8101-8193.

[3] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] *D.D.*, 57 ECAB 734 (2006).

claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the factors identified by the claimant."[6]

ANALYSIS

The evidence establishes that appellant was exposed to certain cleaning agents at work and that he was diagnosed with several respiratory conditions that included asthma. However, the Office found that appellant had not established that he developed a diagnosed condition that was causally related to an employment factor.

The Board notes that appellant presented several medical reports, such as those from Drs. Green and Reddy, indicating that he had asthma exacerbated by his work environment. The Office referred appellant to Dr. Lubman for further evaluation. In his August 25, 2007 report, Dr. Lubman noted appellant's history and diagnosed occupational asthma based on clinical evidence. He noted that had a compelling history of work-related symptoms documented in several reports of treating physicians and, coupled with positive response to treatment and avoidance of work environment, this data supported a diagnosis of occupational asthma. Although Dr. Lubman characterized appellant's asthma as occupational, he stated that he was unable to determine the etiology of appellant's condition. He explained that appellant attributed his condition to the employing establishment's change of cleaning products from 3M to Wex-Pro and indicated that the onset of appellant's condition was indeed coincidental with that change. Dr. Lubman noted that, although the Wex-Pro system did not incorporate any potentially irritating chemicals not also present in the 3M system, the specific sensitizing agent might not be immediately apparent. He recommended that appellant avoid chemical exposure because cleaning products were generally considered potential irritants, but cautioned that he was unable to provide a direct causal link between appellant's use of specific cleaning products at work and the development of his asthma. Thus, while Dr. Lubman opined that appellant has occupational asthma based on clinical evidence, he also indicated that he could not explain how the asthma was caused. The Office did not ask Dr. Lubman to clarify or explain his opinion on causal relationship before it denied appellant's claim.

The Board notes that proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. Rather, the Office shares responsibility for the development of the evidence. Once it has begun to develop the medical evidence by, as here, referring appellant for a second opinion examination, it must pursue the evidence as far as reasonably possible. The Office has a responsibility to see that justice is done.[7] Here, it referred appellant to Dr. Lubman for a second opinion examination. Dr. Lubman found that appellant's asthma was occupational in nature yet also indicated that he could not explain the causation of his condition. While an opinion supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, the opinion must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment

[6] *Michael R. Shaffer*, 55 ECAB 386, 389 (2004), *citing Lourdes Harris*, 45 ECAB 545 (1994); *Victor J. Woodhams*, *supra* note 4.

[7] *Peter C. Belkind*, 56 ECAB 580 (2005).

and such relationship must be supported with affirmative evidence, explained by medical rationale and based upon a complete and accurate factual and medical background.[8]

As the Office referred appellant to Dr. Lubman, it has the responsibility to obtain an evaluation which will resolve the issue involved in the case.[9] On remand, it should request that the employing establishment provide any available chemical exposure data for appellant's workplace and prepare an updated statement of accepted facts which includes appellant's occupational exposures. The Office should then request that Dr. Lubman submit a supplemental report containing a reasoned opinion addressing whether appellant has an occupational respiratory condition that was caused or aggravated by workplace exposures. If Dr. Lubman cannot provide such a report, the case should be referred to an appropriate specialist to obtain a rationalized opinion as to whether any workplace exposures caused or aggravated a respiratory condition. Following this and any other development deemed necessary, the Office shall issue an appropriate merit decision in the case.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: July 16, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[8] *Kathy A. Kelley*, 55 ECAB 206 (2004).

[9] *Mae Z. Hackett*, 34 ECAB 1421 (1983), *citing Richard W. Kinder*, 32 ECAB 863 (1981).