

May 22, 2017..... Advisory Board Information and help for Pulmonary disease/CBD

**“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof... a sanction may NOT be imposed or rule or order issued EXCEPT on consideration of the WHOLE RECORD or those PARTS thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. 5 USC 556 (d)” Greenwich Collieries v Director OWP 990 F 2d 730 (1993) U S Supreme Court**

The DEEOIC is mandated to follow the Administrative Procedure Act which includes 5 USC 556 (d). Since the DEEOIC is the “proponent of a rule”, the chronic respiratory diseases must be defined and be supported by substantial evidence before the DEEOIC may deny the claim. In decisions stating that there is “insufficient evidence” does not meet the APA’s consideration and cases should not be denied if there is a upper respiratory disorder or if just the word ‘chronic’ is missing from the diagnosis of bronchitis.

The World Health Organization defines.....**Chronic respiratory diseases (CRDs) are diseases of the airways and other structures of the lung. Some of the most common are chronic obstructive pulmonary disease (COPD), asthma, occupational lung diseases and pulmonary hypertension.** The DEEOIC ( John Vance) has never defined CRDs, but has only given examples and stated that URI is not a CRD.

**Respiratory disease** is a medical term that encompasses pathological conditions affecting the organs and tissues that make gas exchange possible in higher organisms, **and includes** conditions of the upper respiratory tract, trachea, bronchi, bronchioles, alveoli, pleura and pleural cavity, and the nerves and muscles of breathing. Respiratory diseases range from mild and self-limiting, such as the common cold, to life-threatening entities like bacterial pneumonia, pulmonary embolism, acute asthma and lung cancer.

**Chronic respiratory diseases (CRDs) are diseases of the airways and other structures of the lung.** This disease could be characterized by a high inflammatory cells recruitment (neutrophil) **and/or** destructive cycle of infection, (e.g. mediated by Pseudomonas aeruginosa). Some of the most common are asthma, chronic obstructive pulmonary disease, or acute respiratory distress syndrome . **CRDs are not curable.**

It should be noted that the U.S. National Center for Health Statistics **defines a chronic condition as one persisting 3 months or longer.**

The Denver District office’s CE2 Debbie Howell refuses to develop the pre-1993 CBD even though the following facts are in the file and was brought to her attention.

FACTS IN THE FILE FOR PRE-1993 CBD.....

1. Tested for /treated for/ diagnosed with a chronic respiratory disorder
  - a. 12/12/91 ICD-9 code 487.1 ; Influenza, with bronchitis **487.1**
  - b. 8/14/1992 pharyngitis (upper respiratory)
  - c. 4/7/1989 PFT PEFR 71%; MMEF 64%; FER25 75%; FEF75 40% ( The mean forced expiratory flow during the middle half of the FVC (previously known as the mid-expiratory flow rate or MMEF).

- d. 4/29/91 URI upper respiratory infection; NIOSH Spirometry training Guide Appendix B Occupational Lung Disease include occupational irritants such as chlorine, formaldehyde, particulates, etc.
  - e. 11/7/1990 PFT Observed FEV1/FVC 73%
2. Chest x-ray or CT scan with abnormalities....
    - a. CT Scan 2/21/2002 patchy ground glass; eosinophilic pneumonia, sarcoid and cryptogenic pneumonia
    - b. 11/22/2000... ground glass opacities (pg 687 in disc)
    - c. 5/2/2000....bilateral alveolar opacities
    - d. 5/24/2000... hazy opacities with septal thickening; air trapping; "Crazy paving type pattern in the upper lung zones CONSISTENT WITH CHRONIC BERYLLIUM LUNG DISEASE.
  3. Pulmonary function test or diffusion capacity
    - a. 4/24/2004... reduced FEF 25-75 with normal FVC and FEV1, early obstructive pulmonary impairment
    - b. 2/21/2002... O2 sat 92%; FEV1 68%; FVC 75% "wheezes and rhonchi"
    - c. 5/13/2002.....O2 sat decreased 89%; asthmatic bronchitis; wheezing;
    - d. 7/30/2002... PFTs 76%
  4. Clinical course.....
    - a. Advair, Flovent, etc
    - b. Obstructive sleep apnea, chronic bronchitis,
    - c. 10/22/2002 Dr. James Fax... "URI... has Dx of CBD and use inhalers routinely. He states that he has difficulty w/ chemical fumes and dust currently and wishes to be restricted until URI Sx resolve" "restrict respirator use"

CONCLUSION..... **The law is binding, the procedure manual is not binding.** The evidence is sufficient for the pre=1993 CBD determination. It is the mandatory duty for the DEEOIC to **rebut the above evidence with relevant substantial evidence and not just an ambiguous statement of "insufficient"**.

UNDER PART E the "covered illness" is determined by "at least as likely as not that exposure to a toxic substance was a significant factor in aggravating AND/OR contributing to AND/OR causing the illness AND it was at least as likely as not that the exposure was work related, (arose out of work and work duties).

1. At least as likely as not means more than a reasonable suspicion and less than the preponderance of the evidence (<50%).
2. Exposure is proof that the employee came into contact with the toxic substance. "(b) Proof of exposure to a toxic substance **may** be established by the submission of **any appropriate document or information that is evidence that such substance was present at the facility in which the employee was employed and that the employee came into contact with such substance.** OWCP site exposure matrices

- may be used to provide probative factual evidence that a particular substance was present at either a DOE facility.” 20 CFR 30.231 (b) (BINDING)
3. Toxic substance mean ANY material that has the POTENTIAL because of its nature
  4. Significant means **any** factor
  5. “aggravate” “contribute to” “cause” includes preexisting conditions and the causation is a general causation not a medical certainty causation
  6. OWCP will consider the nature, the frequency, the duration. (**NOTE the law does not require the level of exposure, as per US Supreme Court’s interpretation of 5 USC 556 (d), the claimant cannot be sanctioned/ denied because of level of exposure.**)

Another condition the claimant claimed.....

**Bronchomalacia** is a deficiency in the cartilaginous wall of the trachea **or a bronchus** that may lead to **ATELECTASIS** or obstructive EMPHYSEMA. Toxic substances with a known link to emphysema are ammonia, asbestos, cadmium oxide, cement, chlorine, diesel exhaust, endotoxin, sulfur dioxide, etc. see SEM. The employee/claimant was a heavy equipment operator and was exposed to various solvents while performing his work duties. Please note that the date of diagnosis is the date that will be used.

WE even requested that an expert write the “well-rationalized report” that the DEEOIC is requiring, but the CE2 Howell refuses to send to the CMC.

WE are requesting that the DEEOIC ask the expert pulmonary Contract Medical Consultant to write the “*well rationalized conclusion*” that the **consequential conditions** of chronic airway obstruction, obstructive sleep apnea, chronic bronchitis, GERD, hypertension, diabetes and nephrolithiasis are consequential to the accepted pulmonary covered illness and as a result of the progression of the disease and/or treatment of the disease. Specifically, since the DEEOIC has established the consequential illnesses in a policy. Chapter 1-1500 Exhibit 1...” or its treatment due to steroid use” (which MrXXXX used quite frequently), lists gout, hypertension, sleep apnea, airflow obstruction, gastrointestinal conditions, diabetes, etc.

CONCLUSION..... CE2 Howell has a mandated duty to issue the recommended decision in a timely manner. Since the CE2 has not provided any relevant substantial evidence that refutes the evidence in the file, we are requesting that the CBD be accepted and a recommended Decision be issued to accept the Pre-1993 CBD, while waiting for the “well-rationalized report” from the CMC expert.

Respectfully submitted, Donna Hand AR

PLEASE ADDRESS CONSEQUENTIAL ILLNESSES FOR A PULMONARY DISEASE IN A WELL RATIONALIZED REPORT SO THAT EVERY CLAIMANT WILL HAVE THE CONSEQUENTIAL ILLNESSES DIAGNOSED WITH ACCEPTED FOR THE PULMONARY DISEASES.

Donna Hand Worker Advocate and Authorized Representative