No. 94-419C

(Filed June 17, 1998)

* *		
	*	"Any level" of airborne asbestos
ALLEN HOWARTH, JR., ET AL.,	*	exposure does not entitle
	*	employee to environmental
Plaintiff,	*	differential pay (EDP); Nonmutual
	*	offensive collateral estoppel
v.	*	unavailable against government;
	*	Collateral estoppel does not bar
THE UNITED STATES,	*	reconsideration of legal issue
	*	
Defendant.	*	
	*	
* *		

Steven Z. Cohen, Bloomfield Hills, Michigan, for plaintiffs.

Hillary A. Stern, Washington, DC, with whom was **Assistant Attorney General Frank W. Hunger**, for defendant.

Order

Plaintiffs[(1)] have moved for partial summary judgment based on

collateral estoppel.[(2)] They contend that an arbitrator's award of environmental differential pay ("EDP") to certain nonsupervisory, wage-grade "blue collar" employees belonging to the American Federation of Government Employees (AFGE), Local 933, at the Veterans Administration (VA) Medical Center (VAMC) in Allen Park, Michigan, collaterally estops the government from contesting the arbitrator's conclusion[(3)] that, under Appendix J of the Federal Personnel Manual (FPM) 532-1 (now 5 C.F.R. § 532.511 Appendix A), "any exposure" by those wage-grade employees to airborne asbestos entitles an employee to EDP.[(4)] Plaintiffs claim EDP for every day they worked at VAMC Allen Park during the six years before filing their complaint in this case. The facility was closed in 1996.

Defendant has moved for summary judgment on the grounds that "any exposure" is not the correct legal

threshold, and because there are no genuine issues of material fact establishing plaintiffs' exposure to the reasonable permissible exposure level (PEL) established by the VA, or to any level greater than that generally existing in the ambient air. Plaintiffs' motions are denied and defendant's motion is granted, for the reasons stated below.[5]

Facts

Plaintiffs in this case are former employees at the VAMC in Allen Park, Michigan. In 1975, the AFGE and the VA negotiated an airborne asbestos exposure limit of .1 asbestos fiber per cubic centimeter of air (.1f/cc). This EDP threshold, which was set by the VA in 1987, see Circular 00-87-49 (1987), was twice as stringent as the Occupational Safety and Health Administration's (OSHA) standard at that time.[6] See Appendix to Defendant's Motion for Summary Judgment (Def's App.) at 2-3 (Deposition of Frank Denny, Jr.).

On July 26, 1984, AFGE Local 933 filed an arbitration proceeding on behalf of wage-grade (nonsupervisory) employees at VAMC Allen Park. The arbitrator, purportedly based on copious scientific evidence, held that "any level" of exposure warranted the payment of EDP to employees for the six-year period ending with the commencement of the arbitration proceeding (on July 26, 1984). Six of the ten plaintiffs in this case were neither named parties to, nor covered by, the express terms of the arbitration decision, as they were not nonsupervisory wage-grade employees during the relevant period.[7] Two other plaintiffs, Samuel Harris and Otis Lockhart were not wage-grade employees at the time arbitration proceedings were initiated in 1984.[8] Only two plaintiffs, Robert M. Abdo and Joseph L. Belle, who were nonsupervisory employees for some time between 1978 and 1984, and wage-grade employees represented by the union on July 26, 1984, can legitimately be called parties to the arbitration proceedings.[9]

Applicable Law [10]

5 U.S.C. § 5343 (1979) authorizes the payment of EDP for exposure to airborne asbestos. It provides, in pertinent part:

"The Office of Personnel Management, by regulation, shall prescribe practices and procedures for . . . establishing wage schedules and rates . . . . The regulations shall provide -- . . . (4) for proper differentials . . . for duty involving . . . unusually severe hazards . . . ." 5 U.S.C. § 5343(c).

The regulations promulgated pursuant to § 5343 were contained in the Federal Personnel Manual (FPM), Supplement 532-1, S8-7, (1984) (now found at 5 C.F.R. § 532.511 Appendix A), which provided, in pertinent part:

f. **When environmental differential is paid**. (1) An agency shall pay the environmental differential in appendix J to a wage employee . . . when an employee is performing assigned duties which expose him/her to an unusually severe hazard . . . listed in appendix J. . . . (Emphasis added).

* * *

g. **Determining local situations when environmental differentials are payable**. (1) Appendix J defines categories of exposure for which the hazard[s] . . . are of such an unusual nature as to warrant environmental differentials . . . (2) Each installation or activity must evaluate its situations against the guidelines in appendix J . . . . (Emphasis added).

Appendix J reads, in pertinent part:

Differential rate	Category for which payable	Effective date
8%	(16.) Asbestos. Working in an area where airborne concentrations of asbestos fibers may expose employees to potential illness or injury and protective devices or safety measures have not practically eliminated the potential for such personal illness or injury.	Mar. 9, 1975

The statute and OPM regulations effective before 1990 were silent as to the specific level of exposure warranting EDP, leaving that determination to the employing agency. In 1986, OSHA published a revised PEL standard (from 2f/cc to .2f/cc) as an 8-hour time-weighted average. In 1987, the VA set a limit of .1f/cc. See Circular 00-87-4a. (1987). See also 29 C.F.R. § 1910.1001(c)(1) (1987) (OSHA construction work standard set at .1f/cc). These standards require objective measurements of asbestos levels over specified time periods. 58 Fed. Reg. 32,048, 32,049. Legislation enacted in 1992 extended entitlement to Hazard Pay Differentials (HPD), for the first time, to GS employees. 5 U.S.C. § 5545, 58 Fed. Reg. 32,048-01, 1993 WL 191182 (OPM adopting OSHA's HPD standards for General Schedule (GS) "white collar" employees).

Standard of Review

Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action. **Celotex Corp. v. Catrett**, 477 U.S. 317, 322-23 (1986); Rules of the United States Court of Federal Claims (RCFC) 1; Fed. R. Civ. P. 1.

Summary judgment under RCFC 56(c) is appropriate when the moving party "shows," by pointing this out to the court, that there is an absence of evidence to support the nonmoving party's case. See **Avia Group Int'l, Inc. v. L.A. Gear California, Inc.**, 853 F.2d 1557, 1560 (Fed. Cir. 1988) (citing **Celotex**, 477 U.S. at 325). If the nonmovant fails to put in sufficient evidence, by pleadings, depositions, answers to interrogatories or admissions, to create a genuine triable issue as to any material fact, the movant is entitled to judgment as a matter of law. **Avia Group**, 853 F.2d at 1560 (citing **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242 (1986)). The evidence must be viewed in a light most favorable to the nonmovant and all reasonable inferences must be drawn in the nonmovant's favor. Id. at 1560 (citing **United States v. Diebold**, 369 U.S. 654, 655 (1962)). However, the nonmovant must do more than merely raise some doubts; evidence must be proffered that would be sufficient to require submission of the dispute to, and that would support a favorable finding, by a reasonable factfinder. Id.

Discussion

Plaintiffs' Motions

Plaintiffs' motions must be denied on two grounds: (1) as to all but two plaintiffs, the unavailability of

offensive collateral estoppel against the government, and (2) as to all plaintiffs, the unavailability of collateral estoppel for unmixed legal issues.

"Nonmutual 'offensive' collateral estoppel" (i.e., the common law, judicially-created doctrine precluding reconsideration of an issue decided in another forum when only one party was involved in the prior litigation, see **Parklane Hosiery Co. v. Shore**, 439 U.S. 322 (1979)), is unavailable, on policy grounds, against the government. See **United States v. Mendoza**, 464 U.S. 154, 159 (1984) (refusing to allow nonmutual (i.e., "offensive") estoppel against the government). See also **Bingaman v. Department of the Treasury**, 127 F.3d 1431 (Fed. Cir. 1997) (collateral estoppel available against the government only when the parties are the same in both proceedings).[(11)]

As to the only two plaintiffs who were parties to the arbitration proceeding, defendant relied on **Barrentine et al. v. Arkansas-Best Freight Sys., Inc.**, 450 U.S. 728 (1981), in which the Supreme Court expressly refused to give preclusive effect to a grievance decision in a proceeding subject to the Fair Labor Standards Act (FLSA), holding an arbitrator's decision regarding a federal statutory entitlement was not preclusive because it evidenced the "law of the shop," not the "law of the land."

Plaintiffs have cited (and the court is aware of) no instance when the doctrine of nonmutual collateral estoppel has been applied against the government. Plaintiffs argue that the Federal Circuit, in **Carter v. Gibbs**, 909 F.2d 1452 (Fed. Cir. 1990) (in banc), cert. denied, 498 U.S. 811 (1990), held that **Barrentine** was inapplicable to federal sector labor relations because the employee appellants, by accepting a position covered by a collective bargaining agreement, also chose the procedures negotiated by the union and, therefore, could not challenge those procedures in a judicial forum. However, again, all but two plaintiffs here were not parties to the arbitration agreement. The facts in **Carter** are therefore distinguishable. Thus, the arbitrator's decision that "any level" of asbestos exposure (however minute) is sufficient to entitle an employee to EDP is not binding on this court.

Plaintiffs' argument that all plaintiffs were parties to the arbitration proceeding, because they belonged to the same category of employees (i.e., wage-grade employees and members of the bargaining unit at VAMC Allen Park), is unconvincing. As a matter of fact, eight plaintiffs were not named parties in the arbitration proceedings. (Some supervisory employees who had been wage-grade during the relevant period but not AFGE members at the time of the arbitration participated, but only as amici curiae. Their status as intervenors was denied by the arbitrator because "[t]here is nothing in the record to show that t