U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCE M. FALK and U.S. POSTAL SERVICE,
POST OFFICE, Toledo, Ohio

Docket No. 97-1089; Submitted on the Record;
Issued January 27, 1999

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established continuing disability on or after January 23, 1995 causally related to her employment-related condition, and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for merit review on October 21, 1996 on the grounds that the evidence submitted was immaterial and repetitious.

On February 2, 1995 appellant, then a 40-year-old distribution clerk, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that on January 21, 1995 she had an "irritant mucous membrane reaction" to the removal of asbestos from the "workroom floor area." The Office accepted the claim for a temporary "irritant mucous membrane reaction."

In an emergency room report dated January 21, 1995, Dr. Victor Waters, a Board-certified emergency medicine physician, noted that appellant reported that she may have been exposed to asbestos "or other cleaning contaminants" at work. He provided a diagnosis of "allergic exposure."

In a January 23, 1995 report, Dr. Harvey Popovich, a Board-certified family practitioner, noted that appellant presented him with complaints of burning and tearing of the eyes, headache, dry throat and difficulty breathing at work. He noted the symptoms usually began approximately an hour after arriving at work and would dissipate one to two hours after leaving work. Dr. Popovich noted normal vital signs and vision, normal nose and throat, and normal lungs. He noted an assessment of "irritant mucous membrane reaction, etiology undetermined." Dr. Popovich advised that appellant return to work with the restriction that she not return to the "area where the flooring is being removed."

In a January 31, 1995 report, Dr. Randall Finken, a Board-certified family practitioner, noted nose and throat were clear, with "mild clear mucous in both nares." He noted, "remainder

of the exam[ination] is unremarkable at this time but then again she is not being exposed to the same environment at this time." Dr. Finken noted a diagnosis of "irritant mucous membrane reaction." He concluded, "It is my opinion that the symptoms are in direct relationship to the removal of asbestos at work where she is employed based on the fact that her symptoms occur shortly after she arrives at work and clear shortly after she leaves."

By decision dated June 2, 1995, the Office denied benefits after January 23, 1995 on the basis that the medical evidence showed a normal examination as of that date, and the restriction regarding employment on the "workroom floor" was prophylactic in nature. The Office therefore concluded that appellant suffered no compensable disability after January 23, 1995.

Subsequent to the denial determination, the Office received further evidence.

By letter dated January 23, 1995, an employing establishment compensation specialist advised:

> "If [appellant] brings in documentation stating that she should be provided work off the workroom floor because of her alleged allergic reaction to the asbestos removal, let her go home till she brings in documentation stating that she can return to work. I have verified that any fumes or dust resulting from the project are vented to the outside and do not get released to the workroom floor. Therefore, her belief that she is suffering a reaction to something from the project is without foundation."

By letter dated June 1, 1995, an employing establishment safety specialist provided results of air monitoring of the central workroom floor. An airborne fiber reading taken October 5, 1994 showed a concentration of 047. A reading taken January 16, 1995 showed a reading of 013. The safety specialist noted the later reading showed that levels of airborne asbestos had declined significantly from the prior reading, and was below the Environmental Protection Agency "Clean Building" level. He noted the area of asbestos tile removal was fully enclosed and sealed and that air filtration devices were used to prevent asbestos fibers from entering the employees' workroom area.

In a June 1, 1995 letter, the employing establishment advised appellant that the asbestos abatement program "will end in June." She was advised to report to work on June 16, 1995.

By letter dated June 9, 1995, appellant requested an oral hearing.

During the course of the hearing, appellant stated that she did not return to work in January 1995 because the employer failed to provide appropriate accommodation away from the workroom floor. She noted the letter from the employing establishment, dated January 23, 1995, indicating that she should be provided work "off the workroom" if she provided medical documentation. She noted that her physician had recommended work away from the workroom floor.

Appellant additionally testified that the employer made no effort to contact her until June 1995, when she returned to the workroom floor. She worked for five days beginning

approximately June 9, 1995 when her symptoms returned. Appellant noted that she again sought emergency room treatment and her physician again took her off work. She noted that her symptoms "would all leave me" about two hours after leaving the employing establishment.

Additional medical evidence was also received in support of the claim. A June 14, 1995 emergency room report from Dr. Abdul Quazi, a Board-certified emergency medicine physician, indicated that appellant presented on June 13, 1995 with complaints of burning of the eyes, headache and sore throat. He noted appellant's report that she had returned to her employment two days earlier, having been off work since January 1995 on account of the removal of asbestos from the floor. Dr. Quazi noted "both conjunctiva was [sic] red, however, there was [sic] no exudates noted." He noted ears, nose and throat were unremarkable, and normal sinus and lungs. He diagnosed allergic bilateral conjunctivitis.

In a June 19, 1995 disability certificate, Dr. Finken indicated a diagnosis of "irritant mucous membrane reaction" with total disability from June 13 to June 25, 1995.

In a February 23, 1995 letter, Dr. Finken wrote:

> "[Appellant] was seen in my office on June 19, 1995 with complaints of irritant mucous, watery eyes and inability to concentrate. [She] had returned to work on June 6, 1995 because of [i]rritant [m]ucous [m]embrane [r]eaction secondary to asbestos removal at her place of employment, had been off work since January 27, 1995. Since they were still working on the floor when she returned to work, her symptoms recurred. [Appellant] was seen at Riverside [h]ospital [e]mergency [r]oom on June 14, 1995. She was off work June 13 through 24, 1995 for [I]rritant [m]embrane [r]eaction."

By decision dated July 10, 1996, the Office hearing representative affirmed the denial of benefits. The Office hearing representative found that the medical evidence and appellant's own testimony supported the fact that the effects of the aggravation had ceased by January 23, 1995, regardless of whether the employer was able to provide an accommodation away from the offending environment. The hearing representative further found that there was no rationalized medical opinion to support appellant's allegation that she suffered a recurrence of disability causally related to workplace exposure in June 1995.

In an October 3, 1996 letter, appellant requested reconsideration. In her letter, appellant explained why she thought the decision was wrong. Neither new medical evidence nor evidence of agency error was presented with appellant's request for review.

By decision dated October 21, 1996, the Office reviewed appellant's claim on the merits and concluded that the evidence submitted was insufficient to warrant modification of its prior decision.

The Board finds that appellant has not established continuing disability on or after January 23, 1995 causally related to her employment-related condition.

Under the Federal Employees' Compensation Act,[1] when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.[2] However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.[3] Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[4] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[5] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

In the present case, the Office accepted appellant's claim for a temporary "irritant mucous membrane reaction" as a result of work-related exposure on January 21, 1995. By decision dated June 2, 1995, the Office denied appellant's claim for compensation effective January 23, 1995 on the grounds that the weight of the medical evidence showed appellant completely recovered by January 23, 1995 and that there was no work-related exposure after that date. By decision dated July 10, 1996, the Office hearing representative affirmed the denial of benefits as the evidence of record supported that the effects of the aggravation had ceased by January 23, 1995. By decision dated October 21, 1996, the Office denied modification of its prior decision.[7]

In his examination of January 23, 1995, Dr. Popovich noted a completely normal physical examination. Likewise, in his examination of January 27, 1995, Dr. Finken found no abnormalities while noting that appellant was no longer exposed to the work environment. The medical evidence demonstrates consistency with appellant's own testimony and that appellant's symptoms ceased once away from the offending environment. Because medical evidence demonstrates that the effects of the aggravation had ceased by January 23, 1995, the Office properly found that appellant was not entitled to compensation after that date.

Appellant again reported symptoms when she sought emergency room treatment in June 1995. Where an employee alleges that she sustained a recurrence of disability due to an accepted employment-related injury, the employee has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disabling condition for which compensation is sought is causally related to the accepted employment injury.[8] As part of this

[1] 5 U.S.C. §§ 8101-8193.

[2] *Richard T. DeVito*, 39 ECAB 668, 673 (1988); *Leroy R. Rupp*, 34 ECAB 427, 430 (1982).

[3] *Ann E. Kernander*, 37 ECAB 305, 310 (1986); *James L. Hearn*, 29 ECAB 278, 287 (1978).

[4] *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

[5] *Id.*

[6] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[7] *See* 20 C.F.R. § 501.3(d).

[8] *Kevin J. McGrath*, 42 ECAB 109 (1990).

burden, the employee must submit rationalized medical evidence based upon a complete and accurate factual and medical background showing a causal relationship between the current disabling condition and the accepted employment-related condition.[9] The record, however, contains no results of clinical and diagnostic studies, and no rationalized medical opinion explaining whether and how the recurrence of disability was causally related to the workplace exposure. Moreover, appellant's employing establishment reported a safe level of airborne fibers by January 1995. Inasmuch as the record is devoid of a rationalized opinion causally relating appellant's symptoms of June 1995 to her work-related condition, the Office properly found that appellant was not entitled to compensation after January 23, 1995.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits on October 21, 1996.

Under section 8128(a) of the Act,[10] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations, [11]which provides that a claimant may obtain review of the merits of the claim by:

"(i) showing that the Office erroneously applied or interpreted a point of law, or

"(ii) advancing a point of law or a fact not previously considered by the Office, or

"(iii) submitting relevant and pertinent evidence not previously considered by the Office."

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[12]

In support of her reconsideration request, appellant submitted a letter which did not advance legal contentions not previously considered and essentially restated her position which was presented to the hearing officer. The hearing representative had reviewed appellant's contentions in its July 10, 1996 decision. Appellant's contentions therefore are repetitious and did not offer any relevant information not already before the Office at the time of its July 10, 1996 decision. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[13]

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[9] *Herman W. Thorton*, 39 ECAB 875, 887 (1988); *Henry L. Kent*, 34 ECAB 361, 366 (1982); *Steven J. Wagner*, 32 ECAB 1446 (1981).

[10] 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.138(b)(1).

[12] 20 C.F.R. § 10.138(b)(2).

[13] *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983);

As appellant failed to submit any relevant new evidence or advance a legal argument with her request for reconsideration, she failed to comply with the requirements of section 10.138(b)(2) and the Office properly refused to reopen her claim for review of the merits.

The October 21 and July 10, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
January 27, 1999

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

Katherine A. Williamson, 33 ECAB 1696, 1705 (1982).