

On January 18, 2000 appellant, then a 54-year-old procurement analyst, filed an occupational disease claim alleging that she developed shortness of breath and vomiting at work

due to exposure to hazardous chemicals, toxic fumes and poor air ventilation. She continued working her regular schedule, working twice a week from home. Appellant stopped work completely on June 17, 2000 when she was approved for disability retirement from the Office of Personnel Management (OPM) for her multiple sclerosis (MS).¹ The Office accepted her claim for aggravation of asthma.

Dr. Stuart Goodman, a Board-certified neurologist, treated appellant several times following aggravation of her asthma at work. On May 30, 2000 he advised that her neurological problems consisted of MS, chronic severe headaches, vertigo and depression which, in addition to her medical problems, prohibited her from returning to work. Appellant submitted reports from her treating physician, Dr. Peter Wisniewski, a Board-certified internist. In a January 4, 2000 report, Dr. Wisniewski advised that her occupational exposures did not cause her asthma, rather she had preexisting asthma that was worsened by her exposures. He recommended that appellant work in a different location.

On June 13, 2000 appellant filed a Form CA-7, claim for compensation, beginning June 17, 2000. On April 4, 2002 the Office referred her to Dr. Surjit Julka, a Board-certified internist specializing in pulmonary disease, for a second opinion. On April 30, 2002 Dr. Julka noted that, as appellant was not working, she was not wheezing and her pulmonary function studies were normal. He opined that, from a pulmonary point of view, she was able to work but needed to avoid chemicals to which she was allergic. Dr. Julka indicated that exposure to chemicals worsened appellant's underlying asthma and that she should be able to work as long as she avoided exposure to chemicals and toxic fumes.

On March 4, 2003 the Office denied appellant's claim for disability compensation beginning June 17, 2000 finding the medical evidence was insufficient.

On March 28, 2003 appellant requested an oral hearing. In a June 18, 2003 decision, an Office hearing representative remanded the case for further development, finding that Dr. Julka's second opinion evaluation did not address whether appellant was disabled from work in June 2000 due to her accepted condition.²

On August 27, 2003 the Office referred the medical record to Dr. Eric Freeman, a Board-certified internist specializing in pulmonary disease, for a second opinion. In a September 5, 2003 report, Dr. Freeman reviewed appellant's medical treatment and statement of accepted facts. He advised that it was impossible to provide the extent of disability related to her June 2000 work injury as there were no pulmonary function studies of record. He also noted that contemporaneous physical examination treatment records revealed no abnormal breath sounds. Dr. Freeman indicated that an April 2002 pulmonary function study revealed no significant lung disability or abnormalities despite appellant's complaints. He noted that there were abnormal pulmonary function results in 1999. Dr. Freeman stated that many of appellant's problems such as vomiting, headaches and shortness of breath could not be related to her lung complaints or

¹ Appellant asserts that she was placed on medical retirement also due to her asthma condition.

² Based on this decision, the Office paid appellant wage-loss compensation from June 17, 2000 to April 29, 2002.

asthma. He found no evidence of significant lung disability based on pulmonary function tests of April 30, 2002 and April 1, 2003.

On November 20, 2003 the Office proposed to terminate compensation, finding that the weight of medical evidence, represented by Dr. Freeman's report, established that appellant's accepted medical condition had ceased or was no longer work related.

Appellant subsequently submitted a March 26, 2003 report from Dr. Wisniewski, who noted that he did not necessarily agree with her belief that her asthma was secondary to workplace exposure. Dr. Wisniewski advised that she probably had preexisting asthma that her work had exacerbated. He expressed doubt that she had actual exposure to anything that would cause occupational asthma. There were no records to confirm that appellant was ever diagnosed with occupational asthma. He advised that problems with her dyspnea could be related to her MS and muscular weakness. On June 18, 2003 Dr. Wisniewski noted appellant's complaint of occasional shortness of breath when it was humid. Upon examination, he found that her lungs were clear with no sounds of wheezing, rales or rhonchi. Dr. Wisniewski diagnosed multiple medical problems and possible exacerbation of asthma. In reports dated September 10, 2003 and May 19, 2004, he noted that appellant's lungs were clear and her asthma was controlled and stable.

In a decision dated August 18, 2004, the Office terminated appellant's compensation benefits effective March 5, 2004 finding Dr. Freeman's report established that her accepted condition had resolved.

Appellant requested an oral hearing and asserted that she was not provided copies of all evidence used as the basis for the Office's decision. At the July 20, 2005 hearing, appellant's representative inquired as to why appellant was referred to Dr. Freeman rather than Dr. Julka for the supplemental second opinion evaluation. On September 29, 2005 the Office hearing representative remanded the case for the Office to request a supplemental report from Dr. Julka or provide an explanation as to why he was not available and accordingly refer appellant to another physician for a second opinion.

On February 10, 2006 the Office referred appellant to Dr. Natvarlal Rajpara, a Board-certified internist specializing in pulmonary disease, for a second opinion evaluation.³ In a March 22, 2006 report, Dr. Rajpara reviewed appellant's history of injury and medical treatment. He noted that she had not worked for six years and denied any wheezing or coughing. Dr. Rajpara advised that she was diagnosed with asthma and MS 20 years prior. He noted that her asthma was well managed with medication until appellant stopped work six years earlier. Dr. Rajpara performed a pulmonary function study that revealed a mild degree of airflow obstruction that improved significantly after bronchodilator. The study also showed normal lung volumes and increased airway resistance. Dr. Rajpara found that the results were consistent with mild bronchial asthma. Upon examination, he noted that appellant's nasal passages were open and her throat and lungs were clear. Dr. Rajpara diagnosed mild degree of bronchial asthma that was well controlled with current asthma medication. He indicated that anxiety and stress caused

³ In a January 9, 2007 memorandum, the Office noted that a supplemental report could not be obtained from Dr. Julka as he no longer worked where appellant was previously examined.

many of appellant's complaints such as feeling tired and shortness of breath at rest. Dr. Rajpara indicated that an April 30, 2002 pulmonary function study showed normal airflow indicating that the asthma was in remission. He found that appellant was not totally disabled based on a mild degree of bronchial asthma, which was well controlled. Dr. Rajpara noted that she could have disability based on anxiety, stress and fatigue from her MS. He advised that appellant could work full time in a clean environment with no exposure to cold air or any odors, chemicals or fumes. Dr. Rajpara also advised that she could perform light-duty work at a slow pace in a less stressful environment with controlled temperature and no chemical fumes.

In a January 12, 2007 decision, the Office terminated appellant's compensation benefits finding that the weight of the medical evidence rested with Dr. Rajpara and did not support that she had residuals of her accepted work-related condition.

On February 11, 2007 appellant requested an oral hearing, which was held on June 19, 2007. In support of her request, she also submitted a June 18, 2007 report from Dr. Goodman, who noted treating her for MS, which was in remission. He stated that appellant had unrelated respiratory problems consisting of asthma. Dr. Goodman reiterated that her asthma and MS were unrelated. He further noted that asthma could aggravate her MS, but MS could not aggravate her asthma. Appellant resubmitted several reports from Drs. Goodman and Wisniewski already of record.

In a September 5, 2007 decision, an Office hearing representative remanded the case for further development finding that the medical evidence did not specifically address whether the accepted condition was a permanent or temporary aggravation of appellant's asthma. She directed the Office to request a supplemental report from Dr. Rajpara.

In an October 31, 2007 supplemental report, Dr. Rajpara found that appellant had a temporary aggravation of asthma at work that ceased when she was removed from the workplace environment six years prior. He noted that her condition was partially aggravated when she worked in the office twice. Dr. Rajpara indicated that an April 30, 2002 pulmonary function study showed normal airflow indicating that the asthma was in remission when appellant was away from work. He advised that she was not totally disabled as her asthma was well controlled with only a mild degree of airflow obstruction which normalized after bronchodilation during the March 2006 examination. Dr. Rajpara further advised that appellant could do sedentary work in a clean environment free of chemicals, fumes, dust and cigarette smoke. He also noted that stress, anxiety and MS were factors to consider in determining whether appellant was mentally ready to work.

In a decision dated January 16, 2008, the Office terminated appellant's compensation benefits finding that the weight of the medical evidence rested with Dr. Rajpara who found no evidence of ongoing aggravation or disability due to appellant's January 14, 2000 injury.

On February 14, 2008 appellant requested an oral hearing which was held on July 2, 2008. She asserted that she did not receive a copy of her case as she had requested. In an April 13, 2008 statement, appellant sought to subpoena Drs. Julka and Rajpara as well as the case file. She also provided comments to portions from the transcripts of prior oral hearings. In a May 29, 2008 letter, appellant again requested a copy of her record. In a July 2, 2008

statement, she provided a timeline and description of her treatment and news articles about asthma from the internet. Appellant resubmitted Dr. Goodman's June 18, 2007 report and several treatment notes from Dr. Wisniewski dated between October 23, 2001 and March 8, 2006 diagnosing asthma and MS, including a March 8, 2006 report noting mild wheezing in appellant's lungs and diagnosing exacerbated asthma.

In a September 16, 2008 decision, an Office hearing representative affirmed the January 16, 2008 decision, finding that the medical evidence did not support that appellant had any ongoing asthmatic condition causally related to her accepted aggravation. The hearing representative denied her subpoena request, finding that the opinions of Drs. Julka and Rajpara were already of record and nothing new could be gained from their presence at the hearing. The hearing representative noted that the Office had supplied appellant with a copy of her case record.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ After it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is 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 The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, the Office must establish that the claimant no longer has residuals of an employment-related condition, which requires further medical treatment.⁷

Under the Federal Employees' Compensation Act,⁸ when employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the periods of disability related to the aggravation. When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased, even if the employee is medically disqualified to continue employment because of the effect work factors may have on the underlying condition.⁹

⁴ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

⁵ *Vivien L. Minor*, 37 ECAB 541 (1986).

⁶ *T.P.*, 58 ECAB ____ (Docket No. 07-60, issued May 10, 2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁷ *E.J.*, 59 ECAB ____ (Docket No. 08-1350, issued September 8, 2008).

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Raymond W. Behrens*, 50 ECAB 221 (1999).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained aggravation of asthma due to her workplace exposure to chemical fumes. It terminated her benefits effective January 16, 2008. This followed medical development by the Office in which it referred appellant to Dr. Rajpara for a second opinion evaluation.

In a March 22, 2006 report, Dr. Rajpara noted that appellant had asthma that was first diagnosed in 1986 and which had been well controlled with medication and, at the time of his examination, she had a mild degree of bronchial asthma that was also well controlled with medication. He further opined that her complaints of feeling tired and shortness of breath were caused by her own stress and anxiety. Dr. Rajpara conducted a pulmonary function study revealing a mild degree of airflow obstruction that significantly improved after using a bronchodilator. The test also revealed normal lung volumes and increased airway resistance, all consistent with a mild degree of bronchial asthma. After reviewing appellant's record, performing diagnostic tests and conducting his own examination, Dr. Rajpara concluded that she was not totally disabled as her mild degree of bronchial asthma was well controlled and that she was able to work full time with restrictions on temperature and fume or chemical exposure. He advised that appellant might have disability due to her anxiety, stress and fatigue from her MS.

In order to address whether appellant's aggravation of asthma was permanent or temporary, Dr. Rajpara submitted a supplemental report on October 31, 2007. He found that the aggravation of her asthma was temporary and began remission when she was able to work from home twice a week. He opined that her asthma condition completely ceased when she was removed from the workplace six years prior. Dr. Rajpara explained that normal airflows shown in an April 30, 2002 pulmonary function studies revealed that appellant's asthma was in remission and no longer aggravated when she was away from work. He reiterated that she was not totally disabled as her asthma was well controlled with only a mild degree of airflow obstruction which normalized after bronchodilation. Dr. Rajpara advised that appellant could perform sedentary work restricted only by a clean environment free of chemicals, fumes, dust and cigarette smoke.

The Board finds that Dr. Rajpara's report represents the weight of the medical evidence and that the Office properly relied on his report in terminating appellant's benefits. Dr. Rajpara's opinion is based on proper factual and medical history and his report contained an accurate summary of the relevant medical evidence. Furthermore, he analyzed this information in addition to his own findings on examination, including pulmonary function studies, to reach a reasoned conclusion regarding appellant's condition.¹⁰ Dr. Rajpara found no basis on which to attribute any current condition or disability to her employment.

While the record contains reports from Dr. Wisniewski regarding his treatment of appellant's asthma, only his January 4, 2000 report definitively stated that her preexisting asthma

¹⁰ See *Naomi Lilly*, 10 ECAB 560 (1959) (the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are factors which enter into the weight of an evaluation).

condition was worsened by work exposures. Dr. Wisniewski's March 26, 2003 report expressed doubt with regard to whether appellant had any workplace exposure to any substance that would cause occupational asthma. He noted that her dyspnea could be related to her MS and muscular weakness. Other reports by Dr. Wisniewski did not address causal relationship. Dr. Goodman's June 18, 2007 report advised that appellant's MS and asthma were unrelated but the physician did not address whether appellant's asthma was employment related. There is no other medical evidence contemporaneous with the termination of appellant's benefits which supports that appellant has any continuing employment-related condition.

Consequently, the Board finds that the weight of the medical evidence establishes that aggravation of appellant's asthma condition had ceased and that she had no residuals due to her accepted condition. Therefore, the Office met its burden of proof to terminate appellant's compensation benefits effective January 16, 2008.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles. Office regulations provide that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.¹¹

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.¹² Section 10.619(a)(1) of the implementing regulations provide that a claimant may request a subpoena only as a part of the hearing process and no subpoena will be issued under any other part of the claims process. To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.¹³

The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.¹⁴

¹¹ 5 U.S.C. § 8126; 20 C.F.R. § 10.619; *G.T.*, 59 ECAB ____ (Docket No. 07-1345, issued April 11, 2008).

¹² *L.W.*, 59 ECAB ____ (Docket No. 07-1346, issued April 23, 2008).

¹³ 20 C.F.R. § 10.619(a)(1); *G.T.*, *supra* note 11.

¹⁴ *L.W.*, *supra* note 12.

ANALYSIS -- ISSUE 2

On February 14, 2008 appellant requested an oral hearing and by letter dated April 13, 2008, she requested to subpoena Drs. Julka and Rajpara as well as the case record. In a September 16, 2008 decision, an Office hearing representative denied appellant's request to subpoena such witnesses and the case record. She found that the physicians' opinion were already of record and addressed the points at issue and that there was no need for them to be present. The hearing representative also noted that appellant had already been provided with a copy of the case record.

The Board finds that the hearing representative properly denied appellant's subpoena request as she did not establish why a subpoena was the best method to obtain the evidence in question. She also failed to explain why either of these physicians possessed additional information relevant to her claim that could not be obtained by other means. Regarding the subpoena for the case record, appellant did not identify why a subpoena was necessary to produce relevant evidence since appellant had already been provided with a copy of her case record.

The Board finds that the hearing representative did not abuse her discretion in denying appellant's request for a subpoena.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective January 16, 2008. The Board also finds that the Office properly denied her request for a subpoena.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated September 16 and January 16, 2008 are affirmed.

Issued: October 23, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board