U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLOS I. RIVERA and DEPARTMENT OF VETERANS AFFAIRS, SAN JUAN VETERANS ADMINISTRATION MEDICAL CENTER, Puerto Rico

Docket No. 96-1992; Submitted on the Record;
Issued July 27, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits; and (2) whether the Office properly denied appellant's request for hearing.

In the present case, the Office accepted that appellant, a licensed practical nurse, sustained aggravation of bronchial asthma due to construction dust exposure from February 6 though April 14, 1984. Appellant had claimed that his bronchial condition since July 1979 was caused by his federal employment, specifically exposure to the employing establishment's air conditioning; sprays used to combat odors; floor wax; pesticides; and construction dust. The record indicates that appellant lost time from work intermittently from 1979. The Office only accepted appellant's claim for aggravation of bronchial asthma by construction dust in 1984. Appellant stopped work on June 30, 1988 and did not return, the Office also accepted that appellant sustained a recurrence of his accepted bronchial condition in 1988 and paid all appropriate compensation benefits thereafter.

The medical evidence of record indicates that appellant obtained treatment from Dr. Paul Reyes Sosa continually from February 1984. In a report dated August 12, 1993, Dr. Reyes Sosa stated that appellant became sensitive to contaminants present at his work site causing chronic asthma, that his condition had deteriorated and his mental health became affected. Dr. Reyes Sosa concluded that appellant was medically unfit to return to work due to his bronchial asthma, mental condition and back problems.

The Office thereafter referred appellant to Dr. Guatam Shah, Board-certified in pulmonary disease, for a second opinion evaluation. In a report dated January 23, 1995, Dr. Shah reported that appellant had a history of bronchial asthma in the family and exposure to construction dust while working from February 1984 until April 1984. Dr. Shah concluded that appellant may have had some aggravation of his bronchial asthma while he was working, but that he had been away from that work site and at present appellant's current symptoms were not

related to his previous dust exposure. The Office thereafter determined that a conflict existed in the medical opinion evidence.

Section 8123(a) of the Federal Employees' Compensation Act[1] provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[2]

The Office thereafter referred appellant to Dr. David H. Drachler, Board-certified in pulmonary disease, for an impartial medical evaluation to determine whether appellant had any continuing disability causally related to the accepted condition of aggravation of bronchial asthma. In reports dated April 24 and August 9, 1995, Dr. Drachler stated that appellant had bronchial asthma and a restrictive ventilatory defect. Regarding the bronchial asthma, Dr. Drachler concluded that appellant's current pulmonary function studies showed that appellant's obstructive ventilatory defect, the bronchial asthma, was of itself relatively mild and not disabling. Dr. Drachler opined that appellant's period of disability due to the dust exposure should have terminated at the same time Dr. Sosa terminated treatment of appellant's acute asthma in the spring of 1984. Dr. Drachler noted that current spirometric examination showed "quite minor" evidence of asthma. However, he stated that appellant's underlying restrictive ventilatory defect, the etiology of which was not clear "may be more limiting." Dr. Drachler noted that appellant's restrictive ventilatory defect could have been caused by recurrent silent gastric aspiration.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[3] Dr. Drachler properly reviewed the statement of accepted facts in this case and was familiar with appellant's medical history. Dr. Drachler conducted pulmonary function, lung capacity and spirometry evaluations, based upon which he determined that the accepted condition of aggravation of bronchial asthma had ceased, that appellant's asthma no longer was disabling, but rather that any disability was due to a restrictive ventilatory defect, which had not been shown to be caused by appellant's federal employment. As Dr. Drachler properly explained his conclusions regarding appellant's diagnoses and disability with medical reasoning and his opinions were based upon a proper factual and medical background, his opinion as that of the impartial medical specialist is entitled to great weight. Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disabling condition has ceased or that it is no longer related to the employment.[4] The Board finds that the Office met its burden of proof to terminate appellant's

[1] 5 U.S.C. § 8123(a).

[2] *See George E. Reilly*, 44 ECAB 343 (1992).

[3] *Harrison Combs, Jr.*, 45 ECAB 716 (1994).

[4] *Patricia A. Keller*, 45 ECAB 278 (1993).

compensation benefits on September 28, 1995, based upon the reports of Dr. Drachler the impartial medical specialist.

Following the termination of his compensation benefits, appellant submitted an additional medical report to the record from Dr. Reyes Sosa dated January 29, 1996. In his report Dr. Reyes Sosa stated that while appellant was exposed to construction dust at the employing establishment in 1984, he did not claim that his symptoms occurred for first time in 1984. Dr. Reyes Sosa stated that while appellant had not had preexisting bronchial asthma, appellant had noticed much earlier an association with bronchial symptoms and his work environment. He explained that appellant finally stopped working on June 30, 1988 after noticing that his symptoms grew more intense, frequent and persistent for longer periods of time. Dr. Reyes Sosa noted that the medical record documented that appellant had a marked decrease in the frequency and severity of symptoms away from the work environment. He opined that occupatonal asthma agents could be microbial products such as chemicals, high levels of irritant gasses and fumes, antibiotics, wood dust, metal, anhydrides and disocyanates, all of which substances were found at appellant's work environment. Dr. Reyes Sosa concluded that "based on the history of [appellant's] development of asthma, the spirometric evidence of obstructive disease which was not present previous to his employment and to the clinical improvement when the patient is away framework, one can only reach a conclusion of occupational asthma in this case."

The Board has held that the fact that a condition manifests itself or worsens during a period of employment or that work activities produce symptoms revelatory of an underlying condition, does not raise an inference of causal relationship between a claimed condition and employment factors.[5] The Office had accepted in this case that appellant's bronchial asthma was aggravated by construction dust at his work during early 1984. The Office did not accept that appellant's underlying conditions were caused by his employment. Appellant's physician, Dr. Reyes Sosa, reported that because appellant had no prior history of asthma prior to his employment, his work environment prior to 1984 must have caused the underlying bronchial asthma. Causal relationship cannot however be established by a mere temporal relationship between development of the medical condition and a period of employment. While Dr. Reyes Sosa also delineated a number of agents he believed were present at appellant's workplace which could cause bronchia asthma, his opinion was speculative in nature. Dr. Reyes Sosa was not able to state with any specificity which agents appellant was exposed to and he did not state the degree and nature of the exposure. Furthermore, he did not provide any medical rationale to explain how any of these alleged agents would have caused the underlying condition and would continue to disable appellant. An obscure etiology of a disease or condition does not shift the burden of proof to the Office to disprove an employment relationship. Neither does the absence of known etiology for a condition relieve an appellant of the burden of establishing a causal relationship by the weight of the evidence, which includes affirmative medical opinion evidence based on the material facts with supporting rationale.[6] Dr. Reyes Sosa's speculative opinion

[5] *Ruby Fish*, 46 ECAB 276 (1994).

[6] *Judith A. Peot*, 46 ECAB 1036 (1995).

regarding causal relationship of appellant's underlying bronchial asthma and his federal employment is not sufficient to meet appellant's burden of proof.

The Board also finds that the Office did not abuse its discretion by denying appellant's request for hearing.

The Office issued its final decision terminating appellant's compensation benefits on September 28, 1995. Appellant requested a hearing before an Office hearing representative on September 24 and November 13, 1995. The Branch of Hearings and Review denied appellant's request for hearing by decision dated March 12, 1996 on the grounds that the request was untimely filed. The Branch also, in exercising its discretion, considered appellant's request and determined that the issue in this case could be equally well addressed by requesting reconsideration from the District Office, with submission of further medical evidence not previously considered.

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[7] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days after issuance of the final decision.[8] Even when the hearing request is not timely, the Office has the discretion to grant the hearing request, and must exercise that discretion.[9] In the present case, the Office properly determined that appellant's hearing request was untimely filed and the issue could be resolved by submitting additional medical evidence and requesting reconsideration. The Board finds that the Office did not abuse its discretion under the circumstances of the case.

[7] 5 U.S.C. § 8124(b)(1).

[8] *See Charles J. Prudencio*, 41 ECAB 499 (1990). As appellant's September 24, 1995 request for hearing was made before the Office issued a final decision, that request was also not timely made.

[9] *Id.*

The decisions of the Office of Workers' Compensation Programs dated April 14 and March 12, 1996 and September 18, 1995 are hereby affirmed.

Dated, Washington, D.C.
July 27, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member