

**United States Department of Labor
Employees' Compensation Appeals Board**

T.K., Appellant)

and)

U.S. POSTAL SERVICE, KILMER)
PROCESSING & DISTRIBUTION CENTER,)
Edison, NJ, Employer)

Docket No. 08-997

Issued: November 12, 2008

Appearances:

*Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 19, 2008 appellant, through his attorney, filed a timely appeal from a September 25, 2007 decision of an Office of Workers' Compensation Programs' hearing representative finding that he had not established a pulmonary condition due to his federal employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof in establishing that he developed a pulmonary condition due to exposure to dust and fumes in the course of his federal employment.

FACTUAL HISTORY

On June 25, 2001 appellant, then a 38-year-old mail handler, filed an occupational disease claim alleging that he developed a respiratory condition due to exposures to dust and

fumes at the employing establishment. In a letter dated July 16, 2001, the Office requested additional factual and medical evidence. It allowed 30 days for a response.

Dr. Iris G. Udasin, Board-certified in preventative medicine, completed a report on March 20, 2001 noting appellant's symptoms of a persistent need to clear his throat and increased phlegm production. Appellant's symptoms were suggestive of possible post-nasal drip and that spirometry revealed a moderate restrictive deficit. Dr. Udasin stated that it was "possible" that appellant's symptoms were an allergic or irritant response to dust inhalation from workplace exposures.

Dr. Grace Ziem, a specialist in occupational medicine, completed a note on June 19, 2002. She stated that appellant had an "occupational disease" which was aggravated by his work environment. Dr. Ziem identified problems with the employing establishment building where appellant worked, including idling diesel vehicles, infrequent maintenance of the heating, ventilation and air conditioning (HVAC) system as well as asbestos in the floor. On July 19, 2001 she described appellant's symptoms of skin itching, nasal itching and throat irritation as well as congestion and mucous, cough with phlegm and sleep disturbance. Dr. Ziem attributed his symptoms to diesel exhaust, a poorly maintained HVAC, solvents from inks and cleaning chemicals. She diagnosed reactive airway disease, increased chronic fatigue and mild toxic encephalopathy and attributed these conditions to appellant's occupational exposures.

In a letter dated July 24, 2001, the employing establishment stated that a March 22, 2001 study established that there was no formaldehyde at the employing establishment. Furthermore, asbestos and nuisance dust were found to be well below the permissible exposure limits. William Luckerman, a safety specialist, completed two tests for formaldehyde at the employing establishment on March 22, 2001 and both were negative. The employing establishment alleged that the HVAC was found to be satisfactory and that there were no health issues presenting a hazard to employees at the facility. A February 23, 2000 report from the Louis Berger Group found that asbestos and nuisance dust were below the permissible exposure limits established by the Occupational Safety and Health Administration (OSHA). The Louis Berger Group also found that the HVAC was satisfactory, except for a relatively low humidity and that there was no current hazard to the employees.

Appellant submitted a narrative statement alleging that he developed difficulty breathing, phlegm and chest congestion due to exposure to smoke, fumes and dust at the employing establishment.

The Office referred appellant, a statement of accepted facts and a list of questions to Dr. John Penek, a Board-certified pulmonologist, for a second opinion evaluation on November 8, 2001. In a January 23, 2002 report, Dr. Penek found that appellant's lungs were clear to auscultation and percussion and that a January 9, 2002 pulmonary function test demonstrated "very mild obstructive lung disease with an equivocal response to inhaled bronchodilators and normal oxygenation." He diagnosed asthma bronchitis with intermittent bronchospasm and noted that appellant's pulmonary function test showed mild and equivocal impairment. Dr. Penek recommended additional worksite air quality testing. He noted that away from work appellant was completely recovered without significant residual respiratory symptoms.

By decision dated March 13, 2002, the Office denied appellant's claim finding that Dr. Penek's report did not support an employment-related respiratory condition. Dr. Penek submitted an additional report on March 27, 2002 and stated that appellant did not require ongoing treatment as his respiratory problem was in remission and his pulmonary function test demonstrated no abnormality and no respiratory impairment. He noted, however, that, if appellant returned to work at the employing establishment, then additional testing of the employing establishment would be necessary.

Appellant, through his attorney, requested an oral hearing on April 1, 2002. He submitted a May 22, 2002 report from Dr. Ziem, who reviewed his spirometry testing of April 18, 2001 and January 9, 2002 and concluded that, while his larger airways were normal, he demonstrated small airway flow reduction. Dr. Ziem diagnosed permanent reactive airway disease and toxic encephalopathy.

In an April 18, 2003 decision, the hearing representative found that the Office should obtain environmental testing results, amend the statement of accepted facts and request a supplemental report from Dr. Penek addressing the causal relationship between appellant's diagnosed condition and his environmental employment exposures.

Appellant submitted a February 6, 2003 report from Dr. Ziem, who diagnosed significant reactive airway disease exacerbated by exposure to irritants and volatile organic compounds. Dr. Ziem repeated the finding of significant reduction in small airways and breathing capacity. She stated that appellant was totally and permanently disabled from work at the employing establishment and any work around "irritants, pollutants, combustions products and other toxins."

The employing establishment submitted additional testing documentation on June 24, 2003. In a letter dated July 21, 2003, the Office requested a supplemental report from Dr. Penek based on this information. On October 19, 2003 Dr. Penek stated that he wished to reexamine appellant before providing an opinion. In a report dated November 6, 2003, he noted reviewing all the evidence presented including the amended statement of accepted facts and the environmental testing results. Dr. Penek stated that appellant reported that he was currently free of respiratory symptoms and did not have to use his albuterol inhaler. Appellant noted occasional transient throat irritation but denied cough, dyspnea or other respiratory symptoms. Dr. Penek opined, "[T]here is no current respiratory impairment or disability in [appellant's] situation. Based on the OSHA air quality studies as well as the evaluation of the Environmental and Occupational Health Sciences Institute, I do not believe, based on the current material reviewed that ongoing disability is justified in this patient." He further opined that appellant's pulmonary condition was not caused or aggravated by his employment exposures and that appellant was capable of returning to work at the date-of-injury position.

By decision dated November 24, 2003, the Office denied appellant's claim based on Dr. Penek's reports.

At the oral hearing on August 31, 2004, appellant submitted a report from Dr. Ziem dated September 14, 2004. Dr. Ziem noted appellant's history of injury and stated that he developed tightness in the chest, wheezing, sinus, nose and throat discomfort and hoarseness around

irritants. She found that neurocognitive testing demonstrated reduced attention span and concentration as well as reduced short-term memory. Dr. Ziem opined that appellant was exposed to a wide mixture of chemicals such as diesel exhaust, solvents from inks and mail with scented products in a very dangerous combination at the employing establishment. She diagnosed persistent reactive upper and lower airway disease, toxic encephalopathy and neural sensitization and opined that these conditions were the result of an occupational disease.

By decision dated November 29, 2004, the hearing representative set aside the November 24, 2003 decision of the Office and remanded the claim for additional development of the medical evidence in the form of a supplemental report from Dr. Penek addressing whether appellant ever had a pulmonary condition due to his employment exposures.

Dr. Penek completed a report on August 25, 2005. He reviewed the statement of accepted facts as well as the medical evidence of record. Dr. Penek noted that appellant reported feeling short of breath in confined areas. He noted that appellant took no medications and had no exercise limitations. Dr. Penek stated that appellant's pulmonary function test was totally within normal limits. He stated, "I believe that it is extremely unlikely that there ever was respiratory impairment during his employment. This is particularly likely in view of the submissions of all onsite studies that have refuted the patient's as well as Dr. Ziem's contention that there was significant exposure on the worksite." Dr. Penek noted that appellant may have experienced a nonemployment-related asthmatic-bronchitic disorder with no worksite precipitating factor. He further disagreed with Dr. Ziem's opinions stating that her conclusions were spurious and false.

By decision dated September 19, 2005, the Office denied appellant's claim based on Dr. Penek's reports. Appellant, through his attorney, requested an oral hearing on September 21, 2005. By decision dated May 8, 2006, the hearing representative set aside the September 19, 2005 decision finding that there was an unresolved conflict of medical opinion between Drs. Panek and Ziem.

On January 30, 2007 the Office referred appellant, a statement of accepted facts and a list of specific questions for an impartial medical examination with Dr. Monroe Karetzky, a Board-certified pulmonologist of professorial rank.¹ In a February 15, 2007 report, Dr. Karetzky reviewed appellant's history of injury and medical treatment. He reported findings on physical examination, pulmonary function testing and chest x-ray. Dr. Karetzky found that appellant's testing revealed no abnormalities and stated that there was a lack of objective findings of respiratory impairment. He stated, "I therefore conclude with a reasonable degree of medical certainty that [appellant] has no pulmonary disease and no demonstrable objective evidence to support a pulmonary disability. Moreover, there is no objective evidence that the claimant ever suffered from a pulmonary or respiratory condition."

By decision dated March 5, 2007, the Office denied appellant's claim for a pulmonary disease relying on Dr. Karetzky's impartial medical examination. On March 12, 2007 appellant, through his attorney, requested an oral hearing. His attorney appeared at the oral hearing on July 17, 2007 and argued that Dr. Heyman's report should have been excluded from the record.

¹ The record reveals that appellant was initially referred to Dr. Norman Heyman, a Board-certified orthopedic surgeon.

Counsel also disagreed with Dr. Karetzky's findings, contending that he failed to support his conclusion that appellant had never experienced a pulmonary condition.

In a September 25, 2007 decision, the Office hearing representative found that Dr. Karetzky's report was entitled to the special weight of the medical evidence and established that appellant did not develop a pulmonary condition due to his employment. She further found that it was not necessary to exclude Dr. Heyman's report.

LEGAL PRECEDENT

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of a disease or condition for which compensation is claimed; (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.²

The Federal Employees' Compensation Act 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.³ The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁴ It is well established that, when 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 proper factual and medical background must be given special weight.⁵

The Board has required the exclusion of medical reports only if: (1) the physician selected for a referee examination is regularly involved in performing fitness-for-duty examination for the claimant's employing agency; (2) a second referee specialist's report is requested before the Office has attempted to clarify the original referee specialist's report; (3) a medical report is obtained through telephone contact or submitted as a result of such contact; and

² *Solomon Polen*, 51 ECAB 341, 343-44 (2000).

³ 5 U.S.C. §§ 8101-8193, 8123.

⁴ 20 C.F.R. § 10.321.

⁵ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

(4) a medical report is obtained as a result of leading questions to the physician in either the referee or second opinion context.⁶

ANALYSIS

In support of his claim for a pulmonary condition, appellant submitted reports from Dr. Ziem, a specialist in occupational medicine, who diagnosed reactive airway disease and toxic encephalopathy due to employment-related exposures to dust and fumes. The Office referred appellant for a second opinion evaluation with Dr. Penek, a Board-certified pulmonologist, who opined that appellant did not have an employment-related pulmonary condition. Due to the disagreement between appellant's physician, Dr. Ziem, and the Office referral physician, Dr. Penek, the Office referred appellant to an impartial medical examiner.

The Office initially referred appellant to Dr. Heyman, a Board-certified orthopedic surgeon, for an impartial medical examination. However, it determined that Dr. Heyman was not an appropriate specialist to resolve the conflict of medical evidence and referred appellant to Dr. Karetzky, a Board-certified pulmonologist. Appellant's attorney argued at the July 17, 2007 oral hearing that Dr. Heyman's report should be excluded from the record. As noted, the Office's procedures and the Board require the exclusion of medical evidence only in a limited set of circumstances. In this case, there is no evidence that Dr. Heyman regularly performed fitness-for-duty examinations, or that clarification of his report would be sufficient to resolve the conflict, or that telephone contact occurred or that the Office utilized leading questions in obtaining the findings of the report. Therefore, the Office properly declined to exclude Dr. Heyman's report from the record.

Dr. Karetzky has the appropriate training in pulmonary medicine necessary to resolve the issue in this case, whether appellant developed a pulmonary condition as a result of his employment exposures to dust and fumes. In a February 15, 2007 report, Dr. Karetzky reviewed the medical evidence and the statement of accepted facts. He listed findings on physical examination and diagnostic studies, including chest x-ray and pulmonary function testing. Based on this information, Dr. Karetzky concluded that appellant did not sustain any pulmonary disease based on the objective evidence. The Board finds that Dr. Karetzky's report is entitled to the weight of the medical evidence. Dr. Karetzky submitted a thorough report discussing appellant's previous medical testing and well as the results of testing contemporaneous with his February 15, 2007 report. He noted that appellant's findings were normal and as such there was no evidence of a current or previous pulmonary condition. Dr. Karetzky provided the medical reasoning that as there were no objective findings on physical examination or pulmonary function tests, appellant's claim for a pulmonary condition was not supported.

CONCLUSION

The Board finds that appellant has not established that he developed a pulmonary condition due to his employment-related exposures to dust or fumes.

⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6 (March 2005).

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 12, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board