U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLY J. PIERCE and DEPARTMENT OF THE AIR FORCE, LAUGHLIN AIR FORCE BASE, Tex.

Docket No. 96-1404; Submitted on the Record;
Issued April 28, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of disability from September 1, 1992 through December 10, 1993 causally related to his accepted, employment-aggravated asthmatic condition.

Appellant, an aircraft crew chief/aircraft attendant, filed a Form CA-2 claim for benefits based on an occupational disease on June 29, 1993, alleging that his exposure to smoke and fumes while working on the flight line at his employing establishment resulted in excessive coughing, upper chest pain and difficulty breathing. Appellant stated that he first became aware his condition was related to his employment on September 1, 1992.

In support of his claim, appellant submitted an October 12, 1992 medical report from Dr. David C. Rabinowitz, an osteopath. Dr. Rabinowitz stated that he examined appellant on October 12, 1992, at which time appellant related that when he was away from the smoke and fumes, he merely had pain in the right anterior chest, but did not have any cough or production of blood-streaked sputum. Appellant informed Dr. Rabinowitz that it was only when he was on the flight line pushing the T38's or exposed to the pollution in the immediate area that he would develop a cough, some weakness, and dyspnea, and required the use of an inhaler. Dr. Rabinowitz further noted that appellant was diagnosed as having sarcoidosis in 1982.

Dr. Rabinowitz further stated that, by history, appellant probably had evidence of asthmatic bronchitis with some rhonchi as well as some streaking of blood in his sputum. Dr. Rabinowitz noted, however, that at the present time appellant had been away from the employing establishment for approximately three months and had been using his Beconase and Proventil inhaler on a regular basis. Dr. Rabinowitz further noted that his pulmonary function study was better than one might expect, as on the date of examination he had a forced vital capacity (FVC) of 4.2 liters with a predicted of 5.5 liters or 77 percent of normal, a forced expiratory volume in one second (FEV_1) of 3.32 liters or 79 percent of the FVC and a peak expiratory flow rate of 13 liters per second with a predicted of 9.85 liters per second.

Dr. Rabinowitz stated that with the bronchodilator of Proventil given to appellant immediately before the post-bronchodilator phase of the test, he had an FVC increased to 4.42 liters, the FEV_1 increased to 3.6 liters, and the peak flow rate actually decreased to 10 liters per second. According to Dr. Rabinowitz, this presented a somewhat unusual circumstance in that appellant had been away from the inciting cause of what he considered probably as that of asthmatic bronchitis by history for a period of three months, and further had been taking appropriate therapy of Beconase and Proventil inhaler on a regular basis to prevent these symptoms.

Dr. Rabinowitz concluded that, based on this history, appellant should not be pushing T38 flight trainers or be exposed to any toxic fumes or desert dust as it seemed to adversely affect him. Dr. Rabinowitz stated that it would be advisable if there was some way appellant could be used in a different capacity.[1]

In a letter dated March 10, 1994, the Office of Workers' Compensation Programs referred appellant to Dr. John R. Holcomb, Board-certified in internal medicine, for a second opinion examination, for March 30, 1994. In his March 30, 1994 report, Dr. Holcomb diagnosed mild asthma and sarcoidosis by history (inactive), and status-post arthroplasty of the left knee. Dr. Holcomb stated:

> "(1) Current objective findings include only a mild obstructive defect on pulmonary function testing as well as minor scarring involving the area of the minor fissure of the right lung on radiographic study.
>
> "(2) Appellant's symptoms appear to have developed as early as 1990. However, he is not very exact about the date, and it is probable that he has had the development of adult-onset asthma with increasing manifestations over several years. As such one would expect that exposure to cold air, fumes, upper respiratory infection, smoke, or other noxious materials that can be inhaled would result in a worsening of his condition acutely. Dr. Holcomb stated, however, that he did not identify residuals medically related to the work factors.
>
> "(3) The definitive diagnosis of appellant's work-related condition is 'asthma, exacerbated by fumes in the workplace.' It should be noted that asthma *per se* is not work related; however, this condition is exacerbated by exposure to fumes and other noxious substances as noted above."

Dr. Holcomb concluded that appellant was capable of working an eight-hour day, with the provision that he be excluded from extremes of cold and heat, and from areas of fumes, dust, vapors and other substances.

[1] Dr. Rabinowitz subsequently submitted a report dated December 22, 1993 which essentially repeated all of the findings he made in his earlier, October 12, 1993 report.

The Office accepted appellant's claim based on aggravation of preexisting asthma on May 3, 1994, and adopted Dr. Holcomb's opinion that he was able to work "an eight-hour day with the provision that he be excluded from areas of fumes, dust, vapors, and other substances."

Appellant subsequently filed a Form CA-7 claim for benefits based on pulmonary sarcoidosis and a posterior dislocation of the left knee on June 9, 1994, requesting temporary total disability based on his alleged employment-related conditions for the period September 1, 1992 through December 10, 1993.

In a letter to appellant dated August 1, 1994, the Office stated that it required additional information in support of his claim. The Office requested appellant to have his treating physician submit medical evidence in support of his claim indicating the precise period in which he was disabled and providing a medical rationale in support of his conclusions. The Office requested that appellant submit this information within 30 days. Appellant failed to respond to this request.

By decision dated October 11, 1994, the Office rejected appellant's claim, finding that the medical evidence of record was not sufficient to establish that he was temporarily totally disabled from September 1, 1992 through December 10, 1993 due to his employment-related asthma condition.

By letter dated October 17, 1994, appellant requested an oral hearing.

By letter dated January 3, 1995, the Office informed appellant that it had scheduled a hearing for February 15, 1995.[2]

A hearing was held on February 15, 1995, at which appellant testified that he was out of work during the period May 17 through July 6, 1993 and from August through December 1993 because of his employment-aggravated asthmatic condition. Appellant stated that he began to cough up blood and phlegm in August 1992, at which time he consulted a physician, who administered pulmonary function tests and gave him inhalers. Appellant testified that he continued to spit up blood while working on the line and was transferred to a job which involved painting, which brought him into contact with paint fumes. He stated that in May 1993 his doctor took him off work to get him away from the smoke and paint fumes in his workplace, and that his condition improved after he stopped working as a painter. Appellant further stated that when he returned to work he was given a job on the bench dock, at which he has been able to work without difficulty.

Subsequent to the hearing, appellant submitted treatment notes from the hospital where he was treated from February 26 through August 4, 1993.

In a decision finalized on May 9, 1995, an Office hearing representative determined that the case was not in posture for decision. The hearing representative found that although the Office accepted appellant's claim for temporary aggravation of preexisting asthma, it failed to

[2] The Office's letter mistakenly stated that the date of the hearing was February 15, 1994.

determine when this aggravation ceased. Therefore, the hearing representative vacated the Office's previous decision of October 11, 1994 and remanded it for the Office to further develop the medical evidence and case record.

The Office was instructed to recontact Dr. Holcomb, the second opinion examiner, and ask him to provide a rationalized opinion as to whether the accepted condition caused appellant to be totally disabled and, if so, to provide an opinion as to the date such disability ceased. The hearing representative concluded that upon receipt of Dr. Holcomb's opinion and any additional developmental action deemed necessary, a *de novo* decision should be rendered.

In a report dated June 6, 1995, Dr. Holcomb noted, in response to the Office's question of whether appellant was totally disabled for employment due to his accepted employment-related condition for the period of May 11 through December 10, 1993, that appellant had been under treatment at a Veterans Administration (VA) hospital during that period of time. Dr. Holcomb noted that pulmonary functions on February 26, 1993 demonstrated minimal abnormality, that a statement from that facility dated May 25, 1993 suggested symptoms related to exposure to fumes at the job from which appellant had been transferred, and that repeat pulmonary functions on July 27, 1993 demonstrated normal findings.

Dr. Holcomb concluded that, based upon these documented evaluations, appellant was not totally disabled for employment during the period in question. Dr. Holcomb stated that appellant's restriction involved a workplace free of excessive fumes and dust, but did not in other ways limit his activities, exertional or otherwise. Dr. Holcomb further stated: "As I noted in my evaluation of March 30, 1994, appellant would have been continuously capable of working at the "medium" level given the restrictions described above throughout the entire period in question. As was noted in my original evaluation, it was my understanding that appellant was moved from his job as a flight-line crew chief to work that did not involve exposure to fumes."

In a decision dated June 21, 1995, the Office denied appellant's claim, finding that the evidence appellant submitted was not sufficient to establish that he was totally disabled for employment from September 1, 1992 to December 10, 1993 due to the accepted employment-related aggravation of his asthma condition.[3] In an accompanying memorandum, the Office stated that the evidence of record supported the fact that appellant was reassigned to work in an area free from fumes; therefore, such duty was considered to have been available for the periods for which appellant is claiming total disability. The Office further stated that Dr. Holcomb noted that pulmonary functions performed during those periods demonstrated normal findings, and that his employing establishment had limited-duty positions available to appellant which would not require exposure to smoke or fumes.

The Board finds that appellant has not sustained a recurrence of disability from September 1, 1992 through December 10, 1993 causally related to his accepted, employment-aggravated asthma condition.

[3] The Office treated appellant's claim as a recurrence claim.

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury, and who supports that conclusion with sound medical reasoning.[4]

The record contains no such rationalized medical opinion. Indeed, appellant has failed to submit a reasoned medical opinion indicating that the claimed conditions and disability from September 1, 1992 through December 10, 1993 were caused or aggravated by his employment-aggravated asthma condition. The record contains unrefuted medical evidence, including that of his treating physician, Dr. Rabinowitz, that appellant had preexisting asthma aggravated by employment conditions while working as a crew chief on the flight line, but that he demonstrated he was capable of working an eight-hour day when he was removed from the toxic fumes and dust at this environment. For this reason, he has not discharged his burden of proof to establish his claim that he sustained a recurrence of disability from September 1, 1992 through December 10, 1993 as a result of his accepted employment injury.

In his May 9, 1995 decision, the Office hearing representative instructed the Office to submit additional medical evidence indicating whether appellant was totally disabled at any time during the period from September 1, 1992 through December 10, 1993 due to his accepted employment-aggravated asthmatic condition, and, if so, to indicate the date when this disability ceased. The Office recontacted Dr. Holcomb, who unequivocally stated in his June 6, 1994 medical report that appellant was not totally disabled for employment during the period in question,[5] and that when he was moved from his job as a flight-line crew chief to work that did not involve exposure to fumes and dust, he would have been continuously capable of working at a "medium" level, given his restrictions, throughout the entire period in question.

Thus, without any countervailing rationalized, probative medical evidence, the Office could reasonably rely on Dr. Holcomb's June 6, 1995 medical report disavowing any causal relationship between appellant's claimed condition or disability and his employment-aggravated asthma condition. Causal relationship must be established by rationalized medical opinion evidence. In the instant case, neither Dr. Holcomb nor Dr. Rabinowitz expressed an opinion regarding an alleged causal relationship between appellant's accepted, employment-aggravated asthma condition and the claimed condition or disability from September 1, 1992 to December 10, 1993.

[4] *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

[5] In its June 2, 1995 letter to Dr. Holcomb requesting his opinion regarding whether appellant was totally disabled due to his accepted, employment-related asthmatic condition, the Office inexplicably stated that it required his opinion as to whether appellant was disabled from *May 11* to December 10, 1993, instead of September 1, 1992, pursuant to the hearing representative's request and in accordance with appellant's claim. (Emphasis added). The Board finds that this error is harmless, however, as Dr. Holcomb clearly indicated that appellant was capable of working when removed from exposure to smoke and/or fumes, and the Office properly found in its June 21, 1995 decision that the employing establishment had limited-duty positions available for appellant during the period September 1, 1992 through December 10, 1993 which would not require exposure to smoke or fumes.

As there is no medical evidence addressing and explaining why the claimed condition and disability from September 1, 1992 through December 10, 1993 was caused or aggravated by appellant's accepted asthmatic condition, appellant has not met his burden of proof in establishing that he sustained a recurrence of disability.

The decision of the Office of Workers' Compensation Programs dated June 21, 1995 is affirmed.

Dated, Washington, D.C.
April 28, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member