

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DELMAR W. ARMSTRONG and DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS, Sacramento, Calif.

*Docket No. 97-345; Submitted on the Record;
Issued December 7, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation.

On February 14, 1992 appellant, then a 43-year-old appraiser, filed a notice of traumatic injury alleging that he sustained atelectasis and lung scarring due to unusual working conditions and physiologic stress from his federal employment.

On April 23, 1992 the Office rejected the claim because fact of injury was not established.

Appellant subsequently submitted an April 16, 1992 report from Dr. Norman L. Challburg, his treating physician and a Board-certified family practitioner, diagnosing pneumitis, atelectasis, and lung scarring.

By decision dated June 15, 1992, the Office again rejected the claim because the medical evidence failed to substantiate that work factors contributed to his condition.

Appellant subsequently submitted an August 14, 1992 letter from Dr. Challburg diagnosing subsegmental atelectasis as a direct result of work factors which lead to severe pulmonary infection. He stated that the injury resulted from appellant's exposure to very cold air at an employing establishment training session in January 1992. Dr. Challburg noted appellant's history of asthma. He stated that appellant's continued exposure during the training sessions caused a severe asthma attack which precipitated hemoptysis, pulmonary infection, and subsegmental atelectasis.

On December 31, 1992 appellant requested an oral hearing.

By decision dated February 10, 1993, the Office hearing representative Charlotte King indicated that appellant had filed an occupational disease claim. She directed the Office to

review the additional evidence submitted, develop such evidence, and then issue a *de novo* decision.

The Office subsequently referred appellant to Dr. Deane Hillsman, a pulmonary specialist, for a second opinion examination. In a report dated May 17, 1993, Dr. Hillsman reviewed appellant's medical and work history. She also conducted a physical examination and reviewed x-rays and pulmonary function tests. She stated that appellant had bronchitis on January 12, 1992, possibly with some bronchospasm. She stated that there was no evidence of work-related precipitating factors. Dr. Hillsman stated that there were coincidental, bilateral, minor, basal subsegmental atelectatic abnormalities, but that these were not related to the January 12, 1992 bronchitis and there was no evidence of industrial causation. She also diagnosed asthma by history, but found no evidence of disability or industrial causation.

By decision dated June 18, 1993, the Office rejected appellant's claim because the evidence failed to establish a medical condition causally related to factors of appellant's federal employment. In an accompanying memorandum, the Office indicated that the weight of the evidence rested with Dr. Hillsman's well-reasoned opinion.

Appellant then requested another hearing.

On October 28, 1993 Dr. Jorge L. Alvarez, a specialist in physical medicine and rehabilitation, diagnosed asthma and allergic rhinitis with multiple moderately severe allergic sensitivities. He stated that appellant's complaints of shortness of breath were exacerbated by his work which exposes him to allergens. He further stated that he explained the severity of the disability and indicated it was aggravated by occupational exposures.

On December 30, 1993 Dr. Challburg clarified his opinion. Dr. Challburg reviewed appellant's history of asthma and noted that exposure to cold air triggered appellant's attacks. Dr. Challburg documented the history of prior cold air induced attacks and stated that medical literature supported his opinion. He further stated that the asthma attack was related to appellant's atelectasis because appellant experienced wheezing, tightness in the chest, and shortness of breath, a high temperature, and coughing with mucous after the attack. Dr. Challburg also stated that the x-ray evidence supported his opinion that appellant had atelectasis.

Following the hearing, Office hearing representative Warren D. Landis issued a decision dated December 8, 1993 in which he found that a conflict existed between the opinion of Dr. Challburg, diagnosing an employment-related lung condition, and the contrary opinion of Dr. Hillsman. Because he found these opinions of equal weight, he directed that an impartial specialist provide a referee examination and remanded the case to the Office for further development.

The Office subsequently referred the case, along with a statement of accepted facts, to Dr. Mark W. Lischner, a Board-certified pulmonary specialist, for a referee opinion. On May 11, 1994 Dr. Lischner reviewed appellant's history and conducted a physical examination. He noted that appellant's chest was clear on auscultation and that he heard no wheezes, rales, rubs, or rhonchi. He stated that his pulmonary function test was normal, but that his chest x-ray

revealed some minimal subsegmental atelectasis on the left. He diagnosed recurrent episodes of bronchitic asthma by history; allergies to trees, shrubs, grasses, and molds, and mild rhinorrhea. Dr. Lischner diagnosed recurrent asthmatic bronchitis based on the history appellant supplied and the reports of Drs. Alvarez and Challburg. He stated that the episodes of appellant's asthmatic bronchitis were an aggravation of his preexisting asthma and bronchitis. He stated that exposure to cold could aggravate these conditions and in a predisposed individual lead to infection. He stated that the exposure to cold that appellant experienced aggravated the underlying condition. Dr. Lischner, however, concluded that the aggravation was temporary and ended upon appellant leaving the offending environment and obtaining treatment. He stated that appellant demonstrated normal lung function and that the minor x-ray changes revealing mild atelectasis did not result in disability. He concluded that appellant had no permanent disability related to acute episodes of asthmatic bronchitis.

On July 14, 1994 the Office requested that Dr. Lischner submit a clarifying medical opinion. On July 19, 1994 Dr. Lischner again indicated that appellant's atelectasis did not result in any loss of lung function.

On December 1, 1994 Dr. Alvarez opined that appellant's exposure to allergens at his work site exacerbated his asthma syndrome. He advised appellant to avoid exposure to the allergens.

By decision dated September 6, 1995, the Office rejected appellant's claim because the evidence established that appellant's temporary, employment-related aggravations were limited to three episodes in February 1989, December 1991 and January 1992. In an accompanying memorandum, the Office indicated that it relied on the well-reasoned opinion of Dr. Lischner, the referee examiner.

On September 23, 1994 appellant requested a hearing.

By decision dated August 7, 1995, Office hearing representative Frank James affirmed the Office's September 6, 1994 terminating benefits because he found that the opinion of Dr. Lischner, the referee examiner, carried "the weight of the medical evidence because it contains a rationalized opinion negating permanent residual disability based on a complete and thorough examination of the claimant and all available medical evidence."

The Board finds that the Office met its burden in terminating appellant's compensation for benefits.

Once the Office accepts a claim, it has the burden of proving that the disability ceased or lessened in order to justify termination or modification of compensation benefits.¹ 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 disability has ceased or that it is no longer related to employment.²

¹ *Frederick Justiniano*, 45 ECAB 491 (1994).

² *Id.*

In the present case, the Office accepted appellant had temporary, employment-related aggravations in February 1989, December 1991 and January 1992. Nevertheless, Dr. Hillsman, a pulmonary specialist, opined that appellant's employment-related disability had ceased. Dr. Challburg, appellant's treating physician and a Board-certified family practitioner, disagreed with Dr. Hillsman's assessment and urged that appellant continued to suffer from an employment-related disabling lung condition. Because of the conflict between these two reports, the Office referred appellant to Dr. Lischner, a Board-certified pulmonary specialist, for an impartial medical examination pursuant to section 8123 of the Federal Employees' Compensation Act³.

In situations where there are opposing medical reports of virtually equal weight and the case is referred to an impartial specialist, the opinion of such an impartial specialist will be given special weight if it is based on a proper factual background and well rationalized.⁴ Dr. Lischner reviewed appellant's entire history and conducted a thorough examination. His physical examination revealed that appellant's chest was clear on auscultation and that he heard no wheezes, rales, rubs, or rhonchi. Dr. Lischner's pulmonary function tests rendered normal results and his x-ray interpretations revealed only mild atelectasis, which would not result in disability. Consequently, Dr. Lischner concluded that appellant had no permanent disability related to acute episodes of asthmatic bronchitis. Because Dr. Lischner's opinion was based on a proper factual background and supported by medical rationale, his opinion, as the opinion of the impartial specialist constitutes the weight of the evidence. Moreover, the opinion of Dr. Alvarez submitted subsequent to Dr. Lischner's referee examination is entitled to little weight as Dr. Alvarez failed to address whether appellant was presently disabled.

³ 5 U.S.C. § 8128 *et seq.*

⁴ See *Jack R. Smith*, 41 ECAB 691 (1990).

Accordingly, the decision of the Office of Workers' Compensation Programs dated August 7, 1995 is affirmed.

Dated, Washington, D.C.
December 7, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member