

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YVONNE J. GASPER and DEPARTMENT OF AGRICULTURE,
NATIONAL FINANCE CENTER, New Orleans, La.

*Docket No. 97-1422; Submitted on the Record;
Issued February 17, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden to terminate compensation benefits on October 15, 1995.

The Office accepted appellant's claim for toxic effect of gas and vapors and aggravation of underlying pulmonary disease, asthma, hypertension, allergic rhinitis and coronary artery disease. Appellant stopped working on July 21, 1993, worked intermittently through February 1994 when her doctor rated her totally disabled, was released to work in another building in June 1994 but her symptoms returned and she could not work. Appellant began receiving temporary total disability benefits.

In a report dated December 1, 1993, Dr. Prem Kumar, appellant's treating physician and a Board-certified internist, allergist and immunologist, considered appellant's history of injury, performed a physical examination, reviewed diagnostic tests and diagnosed, *inter alia*, reactive airway disease, *i.e.*, asthma, probably aggravated by inhalants at work, possible sick building syndrome and hypertension. He stated that air sampling results from her workplace were necessary to understand the etiology of her symptoms.

In a report dated July 27, 1994, Dr. Kumar considered appellant's history of injury, performed a physical examination and reviewed numerous diagnostic tests including x-rays, pulmonary function studies and skin testing. He additionally diagnosed syncope and pulmonary disease secondary to hypersensitivity to fumes at the workplace, allergic rhinitis and coronary artery disease. Dr. Kumar stated that appellant recovered almost completely with a few weeks avoidance of the workplace and that long-term sequelae, such as permanent or progressive pulmonary disease, were difficult to predict and might only be assessed on regular followup. He stated that if appellant was not accommodated and continued to be exposed to fumes and inhalant allergens, her symptoms would recur and would continue to increase bronchial inflammation leading to irreversible damage. Dr. Kumar stated that syncope might recur unpredictably depending upon the exposure and the quantity.

By letter dated December 13, 1994, a nurse case manager recorded a conference between her and Dr. Kumar and appellant on October 19, 1994, in which Dr. Kumar stated that appellant could return to work if her workplace was modified as in being in a building without carpet or carpeted walls, an open circulation system, a building with windows which preferably open onto fresh air and an environment with minimal contact with or use of chemicals. He stated that appellant had reached maximum medical improvement and her restrictions were "for the most part" permanent. Dr. Kumar stated that appellant could attempt to return to her original work environment to see if her reactions to her environment were minimized or reduced. Dr. Kumar signed his agreement with the letter on December 21, 1994.

In a report dated February 21, 1995, Dr. Hans Weill, a second opinion physician and a Board-certified internist with a specialty in pulmonary disease, considered appellant's history of injury, performed a physical examination, reviewed x-rays which were normal and reviewed pulmonary function studies which showed no impairment of lung function but indicated a degree of bronchial hyperresponsiveness. He diagnosed underlying atopy, as indicated by elevated IgE and multiple positive allergen skin tests and bronchial hyperresponsiveness. Dr. Weill stated that the poor air quality at appellant's workplace did not cause her respiratory condition but exacerbated her underlying diathesis for her symptoms. He opined that there was "little in the way of objective findings" of a continuing effect of her exposure to poor indoor air quality at work and the nonspecific bronchial hyperresponsiveness was most likely a host factor which might have been demonstrated at any time when the testing was performed, even prior to the alleged exposures. Dr. Weill stated that there were no residual adverse findings and appellant should be encouraged to continue her work as a computer programmer but would probably have to be placed in a job with good indoor air quality.

To resolve the conflict between Dr. Kumar's and Dr. Weill's opinion as to whether appellant's current respiratory problem was work related, the Office referred appellant to an impartial medical specialist, Dr. Hans E. Schuller. In his August 31, 1995 report, Dr. Schuller considered appellant's history of injury and performed a physical examination. He noted that appellant's x-ray results were normal, her pulmonary function studies showed normal air flow but had evidence of bronchial hyperresponsiveness or reactivity and had atrophy with positive skin allergen testing. Dr. Schuller diagnosed reactive airway disease which was exacerbated by irritant exposure, atopy with positive skin testing and hypertension. He stated that appellant's bronchial hyperactivity "should not be active at this time." Dr. Schuller stated that because of her hyperactivity, appellant's symptoms could be explained by various exposures such as perfumes she smells at the grocery store which could aggravate her underlying hyperresponsiveness. He stated that appellant had continued symptomatology but because she no longer was in her work environment, he could not attribute her symptomatology to her previous work exposure. Dr. Schuller stated that based on the pulmonary function studies with which he was provided, there was no objective evidence showing that appellant was disabled. He stated that appellant could resume her computer programming position as long as she was provided a work environment where she had adequate good indoor air quality.

On September 12, 1995 the Office informed appellant that the Office proposed to terminate her benefits as the weight of the medical evidence of record, specifically, Dr. Weill's and Dr. Schuller's February and August 1995 opinions, established that her work-related

aggravation of underlying pulmonary disease, asthma, hypertension, allergic rhinitis and coronary artery disease had ceased. The Office gave appellant 30 days to respond.

By decision dated October 12, 1995, the Office terminated appellant's compensation benefits, effective October 15, 1995, stating that appellant did not respond to the notice of termination and the medical evidence of record established that appellant had no residuals of the accepted work-related condition.

On October 27, 1995 appellant requested an oral hearing before an Office hearing representative which was held on September 27, 1996. Appellant testified that her doctor stated that she could work at home but no one actually tried to accommodate her or think of work she could do at home. She stated that she did not have any breathing problems until July 1993. Appellant's attorney stated that appellant was not disabled at the time but if she returned to the work environment, she would sustain a recurrence. Appellant testified that she could not be exposed to carpets, perfume and cleaning chemicals because they made her cough and triggered an asthma attack. She testified that she could not go to the hairdresser or to church.

Appellant submitted additional medical evidence to support her claim. In a report dated October 13, 1995, Dr. Kumar reiterated his diagnoses and stated that appellant's asthma condition had been stable since she left the workplace but she continued to experience chronic nasal symptoms of nasal congestion, rhinorrhea and post nasal drip upon exposure to numerous scents, particularly perfume and any cleaning agents. He agreed with the other physicians that appellant's bronchial hyperreactivity should not be active due to removal from her work environment. Dr. Kumar opined, however, that appellant had a chronic rhinitis problem secondary to sensitization to inhalants in her workplace for many years. He stated that appellant had never experienced sensitivity to perfume scents prior to her workplace exposure problems of July 1993 and had since been unable to tolerate perfume. Dr. Kumar opined that making appropriate changes in the workplace could allow her to continue to work or she could work at home if permitted.

In a report dated September 23, 1996, Dr. Kumar opined that appellant was an atopic individual and exposure to environmental agents at her workplace brought on symptoms of asthma which she did not have prior to such exposure. He stated that appellant's symptoms of rhinitis and asthma were under control through the use of medication and she was stable. Dr. Kumar stated that although appellant was not totally and permanently disabled at the time, returning to the same work environment would very likely exacerbate her respiratory problems and coronary heart disease, but even if she did not return to the same work environment, she would have to be treated and on medications for her rhinitis and asthma for many years to come.

By decision dated December 11, 1996, the Office hearing representative affirmed the Office's October 12, 1995 decision.

The Board finds that the Office met its burden of proof to terminate compensation benefits.

Once the Office has accepted 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 disability has ceased or that it is no longer related to the employment.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.²

In the present case, in his December 1, 1993 and July 27, 1994 reports, Dr. Kumar's diagnoses included syncope and pulmonary disease secondary to hypersensitivity to fumes at the workplace, probably sick building syndrome, asthma, allergic rhinitis, hypertension and coronary artery disease. In his July 27, 1994 report, Dr. Kumar stated that appellant recovered almost completely with a few weeks avoidance of the workplace. He stated that appellant's continued exposure to fumes and inhalant allergens would cause her symptoms to recur, increase bronchial inflammation and lead to irreversible damage. On December 21, 1994 Dr. Kumar signed his agreement with the nurse case manager that appellant had reached maximum medical improvement but could return to work if her environment was modified as in being in a building without carpets, with windows which preferably opened onto fresh air and had minimal contact with or use of chemicals. He also stated that appellant's restrictions were "for the most part" permanent.

In his February 21, 1995 report, Dr. Weill, the second opinion physician, diagnosed underlying atrophy and bronchial hyperresponsiveness. He stated that there was "little in the way of objective findings" of a continued effect of appellant's exposure to poor indoor air quality at work and that the nonspecific bronchial hyperresponsiveness was most likely a host factor which might have been demonstrated at any time when the testing was performed, even prior to the alleged exposures. Dr. Weill stated that appellant's respiratory problems were not caused by the poor air quality but were exacerbated by it. He stated that there were no residual adverse findings and appellant could return to work but would probably have to be placed in a job with good indoor air quality.

To resolve the conflict between Dr. Kumar and Dr. Weill as to whether appellant continued to be disabled due to the accepted injury, the Office referred appellant to an impartial medical specialist, Dr. Schuller. In his August 31, 1995 report, Dr. Schuller stated that appellant's reactive airway disease was exacerbated by irritant exposure and appellant had atrophy and hypertension. He stated that appellant had continued symptomatology but because she no longer was in her work environment, he could not attribute her symptomatology to her previous work exposure. Dr. Schuller found no objective evidence that appellant was disabled and stated that she could resume her computer programming position provided she had adequate good indoor air quality.

In his October 13, 1995 report, Dr. Kumar stated that appellant's bronchial hyperreactivity should not be active due to removal from her work environment but appellant had a chronic rhinitis problem secondary to sensitization to inhalants in her workplace for many years. He noted that appellant did not experience sensitivity to perfume scents prior to July 1993

¹ *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

² *Larry Warner*, 43 ECAB 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

and had since been unable to tolerate perfume. Dr. Kumar stated that appellant could return to work if appropriate accommodations were made. In his September 23, 1996 report, Dr. Kumar stated that although appellant was not totally and permanently disabled at the time, returning to the same work environment would very likely exacerbate her respiratory problems and coronary heart disease and if she did not return to work, she would require treatment for her asthma and rhinitis for many years to come.

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.³ The Board finds that Dr. Schuller's opinion is sufficiently well rationalized in establishing that appellant was no longer disabled due to her respiratory condition of aggravation of underlying pulmonary disease, asthma, hypertension, allergic rhinitis and coronary artery disease. Dr. Schuller found no objective evidence that appellant was disabled and stated that because of her removal from her work environment, he could not attribute her symptomatology to her previous work exposure. He stated that appellant could resume her computer programming position as long as she was provided a work environment where she had adequate good indoor air quality. In his September 23, 1996 report, Dr. Kumar stated that a return to her usual job would likely exacerbate appellant's respiratory problems and her coronary heart disease. The Board has frequently held that fear of a new injury or recurrence of disability is not a basis for compensation.⁴

Further, although Dr. Kumar indicated on December 21, 1994 that appellant's restrictions were for the most part permanent, his opinion did not establish that the aggravation of appellant's underlying condition was permanent. While an employee is entitled to compensation for periods of disability related to an aggravation to an underlying condition, established by the medical evidence, an employee is not entitled to compensation for periods of disability where the aggravation is temporary and leaves no permanent residuals.⁷ This is true even though the employee is found medically disqualified to continue in such employment because of the effect that the employment factors might have on the underlying condition; under such circumstances, the employee's disqualification for continued employment is due to the underlying condition without any contribution by the employment.⁸ Dr. Schuller found appellant's continued respiratory symptoms were due to her underlying condition and therefore she was no longer disabled due to her work-related respiratory problems. Accordingly, Dr. Schuller's opinion justifies the Office's termination of benefits.

³ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

⁴ *See Patricia A. Keller*, 45 ECAB 278, 287 (1993); *Paul A. Clarke*, 43 ECAB 940, 950 (1992).

The decision of the Office of Workers' Compensation Programs dated December 11, 1996 is hereby affirmed.

Dated, Washington, D.C.
February 17, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member