

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANNY W. MILLER and DEPARTEMENT OF THE ARMY,
KENTUCKY ARMY NATIONAL GUARD, Greenville, KY

*Docket No. 98-1684; Submitted on the Record;
Issued November 10, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective February 22, 1997.

On February 24, 1994 appellant, then a 26-year-old electronics worker, filed a claim for occupational asthma which he related to his work environment. In a subsequent statement appellant indicated that he was exposed to fumes from cleaning solvents, gasoline, diesel fuel, and paint, as well as dust, carbon monoxide, hydraulic fluid, oxygen and acetylene. He stated that he had no previous pulmonary conditions and no diagnosis of asthma or bronchitis prior to his employment at the employing establishment. In an August 31, 1994 decision, the Office denied appellant's claim for compensation on the grounds that fact of injury had not been established. In a November 16, 1994 decision, appellant, through his attorney, requested reconsideration. In a January 6, 1995 decision, the Office vacated the August 31, 1994 decision and accepted appellant's claim for temporary aggravation of asthma. The Office began payment of temporary total disability compensation effective February 18, 1994.

In a March 20, 1997 decision, the Office terminated appellant's compensation effective February 22, 1997 on the grounds that appellant was no longer disabled for his regular duty due to his employment-related condition. In a May 14, 1997 letter, appellant, through his attorney requested reconsideration. In a July 17, 1997 merit decision, the Office denied appellant's request for modification of the March 20, 1997 decision. In a September 9, 1997 letter, appellant's attorney again requested reconsideration. In an October 8, 1997 merit decision, the Office denied appellant's request for modification. In a December 12, 1997 letter, appellant's attorney made a third request for reconsideration. In a January 30, 1998 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was repetitious and irrelevant and therefore insufficient to warrant review of the Office's prior decisions.

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation.

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 disability has ceased or that it is no longer related to the employment.¹

In a February 10, 1994 report, Dr. Thomas A. Gallo, a Board-certified pulmonologist, examined appellant and diagnosed bronchial asthma and allergic rhinitis. In an October 17, 1994 report, he stated that appellant has sustained occupational asthma. He commented that, despite appellant's familial predisposition, asthma that was either precipitated or aggravated while exposed to certain environmental agents known to either cause or aggravate preexisting asthma was considered to be occupational in origin. Dr. Gallo noted that known agents which would cause or aggravate preexisting asthma would include cleaning solvents, paints, diesel fumes and diesel smoke, as appellant had listed. On the basis of this report, the Office accepted appellant's claim for temporary aggravation of occupational asthma.

In a July 11, 1996 report, the Office requested updated information on appellant's condition. In a July 18, 1996 report, Dr. Gallo indicated that appellant's pulmonary function tests were normal. He stated that appellant continued to have persistent hyperreactivity being affected by temperature change, changes in season, respiratory infections and other causes which could set off wheezing and asthmatic symptoms. Dr. Gallo commented that appellant currently was working and his limitations would only include environmental factors, such as avoiding excessively dusty conditions, noxious fumes, and extreme heat or cold. In an August 27, 1996 letter, the Office asked Dr. Gallo whether the effects of appellant's exposure to fumes at the employing establishment had resolved. In a September 4, 1996 report, he commented that the work restrictions imposed were preventive measures. Dr. Gallo stated that occupational asthma or bronchial hyperreactivity precipitated by a specific irritant may continue for years or even a life time despite removal from exposure to the particular irritant. On the basis of this report, the Office terminated appellant's compensation.

In a March 3, 1997 report, Dr. Gallo stated that he had treated appellant for occupational asthma with persistent bronchial hyperreactivity and allergic rhinitis that was aggravated by exposure to cleaning solvents, paint, gasoline, diesel fumes, diesel smoke and dust. He indicated that appellant's condition was permanently aggravated. Dr. Gallo concluded appellant could not return to his regular work at the employing establishment. He commented that appellant would tend to react to noxious fumes, dusty conditions and extreme changes in temperature and his condition would result in the need for future medical treatment for an undetermined length of time. Dr. Gallo indicated that appellant's condition would demand continued use of bronchodilators and anti-inflammatory medication. He noted that appellant's condition did not result in any physical restriction except during flare ups of his asthmatic condition.

¹ Jason C. Armstrong, 40 ECAB 907 (1989).

In a September 4, 1997 deposition, Dr. Gallo noted that appellant's medical records prior to February 10, 1994 did not contain any history of a pulmonary problem other than chronic allergic rhinitis. He indicated that when he examined appellant on February 10, 1994, he gave a history of increasing difficulty in controlling his asthma. Dr. Gallo related that pulmonary function tests performed in February 1994 showed abnormalities consistent with bronchial asthma while previous pulmonary function tests had not shown such abnormal results. He stated, based on the information available, that appellant did not have bronchial asthma prior to his federal employment but did have preexisting bronchial asthma before February 11, 1994. Dr. Gallo concluded from the records that appellant's asthma developed in 1992. He stated that appellant's asthma was precipitated by agents to which he was exposed in his employment, taking four years to develop symptoms requiring medical treatment. Dr. Gallo indicated that, in occupational asthma if a person continued to expose himself to the same agents which precipitated his problem, his condition would worsen despite medication. He noted that appellant's pulmonary function returned to normal by July 18, 1996. Dr. Gallo indicated, however, that it could not be stated that appellant's occupational asthma had resolved just based on pulmonary function tests alone. He stated that appellant would have persistent bronchial hyperreactivity which would be permanent. Dr. Gallo indicated that appellant had not returned to his baseline state that existed prior to 1992 when he first had the onset of symptoms. He noted that appellant had normal pulmonary functions tests in 1990 and 1991 and was not using inhalers at that time. Dr. Gallo concluded that appellant would have bronchial hyperreactivity for the rest of his life. He stated that appellant should not return to work at the employing establishment.

The medical reports of Dr. Gallo show that appellant's exposure to chemical fumes at work at the least caused a permanent aggravation of his bronchial asthma in the form of bronchial hyperreactivity. He concluded that this aggravation would prevent appellant from returning to work at the employing establishment. Dr. Gallo stated that this condition would persist even if appellant showed normal results on pulmonary function tests. His reports therefore cannot be interpreted by that Office as showing that appellant's employment-related condition had resolved to the point that he could return to work at his regular duty at the employing establishment. The reports support the opposite conclusion, that appellant cannot return to his former employment due to a permanent, employment-related aggravation of his bronchial asthma. Dr. Gallo's deposition supports the further conclusion that appellant's employment caused his asthma. The Office, therefore, has not met its burden of proof in terminating appellant's compensation.

The decisions of the Office of Workers' Compensation Programs, dated January 30, 1998, October 8 and July 17, 1997, are hereby reversed.

Dated, Washington, D.C.
November 10, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member