

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELMER R. SEEVERS and DEPARTMENT OF COMMERCE,
BUREAU OF THE CENSUS, Vallejo, CA

*Docket No. 97-1057; Submitted on the Record;
Issued October 7, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the accepted temporary aggravation of appellant's preexisting chronic laryngitis had ceased; (2) whether appellant has established that his kidney condition, codeine dependency and shoulder condition are causally related to his federal employment; (3) whether the Office properly denied appellant's request for a hearing; and (4) whether the Office abused its discretion by refusing to reopen appellant's claim for merit review on June 13, 1996.

This case has previously been before the Board on appeal. On December 11, 1984 appellant, then a 53-year-old science technician with the Department of the Navy, sustained injury to his throat when he inhaled fumes from a toxic chemical spill. The Office accepted his claim and paid appropriate compensation for intermittent disability through April 1, 1985. The Board, in a March 31, 1988 decision, affirmed the Office's determination that appellant was not disabled from work due to his accepted condition after April 1, 1985.¹ Appellant remained in receipt of medical benefits for treatment of residuals of his accepted condition.

Appellant returned to federal employment on August 28, 1990 as a data entry clerk with the employing establishment. On September 11, 1990 he filed a claim alleging that his throat condition was aggravated by factors of his federal employment. Although the Office originally denied this claim by decision dated September 16, 1991, the claim was subsequently developed by referral of appellant for examination by Dr. Edward G. Gallagher, a Board-certified otolaryngologist. In reports dated September 29 and November 4, 1992, Dr. Gallagher addressed appellant's history of throat injury and treatment since 1984. He found that, on examination, appellant experienced immobility of the right vocal cord secondary to submucosal scarring, a subglottic web and/or neurologic paralysis. Dr. Gallagher described appellant's voice as very

¹ Docket No. 88-244, issued March 31, 1988. The findings set forth in the Board's decision are hereby incorporated by reference. The Office found that the accepted injury resulted in chronic laryngitis. Appellant was terminated from employment with the Department of the Navy in January 1985.

weak and breathy and stated that appellant's work as a data entry clerk had aggravated his chronic laryngeal condition due to dry air and an air conditioned environment. He stated that this aggravation represented a temporary worsening of appellant's 1984 throat condition, which ceased when appellant stopped work with the employing establishment.²

Based on Dr. Gallagher's reports, the Office accepted that appellant sustained a temporary aggravation of his chronic laryngitis condition which ceased when he stopped work at the employing establishment. The Office also accepted vocal cord scarring and partial vocal cord paralysis as related to appellant's federal employment for which appellant remained entitled to medical benefits.

On March 23, 1993 appellant filed a claim for wage loss, Form CA-7, for the period commencing January 25, 1985 to the present. In support of his claim appellant submitted an attending physician's report, Form CA-20, from Dr. Arnold Markham who diagnosed chronic right shoulder pain, chronic laryngitis and dysphonia. Dr. Markham indicated that appellant was totally disabled since December 11, 1984.

The Office referred appellant for examination by Dr. Bernard L. Pacella, Jr., a Board-certified otolaryngologist. In reports dated October 11, 1993 and April 11, 1994, Dr. Pacella reviewed appellant's history of injury in 1984 and subsequent medical treatment. He stated that examination revealed a gravelly voice which was completely understandable at conversational levels and distance. Fiber optic laryngoscopy showed good mobility of the vocal cords grossly without evidence of any mucosal lesion of the vocal cords or in the hypo or oropharynx. The remainder of the head and neck examination was reported as unremarkable. Dr. Pacella diagnosed intermittent laryngitis and hoarseness which he attributed as residuals of the 1984 employment injury. He stated that appellant's exposure to toner during his employment would not cause any residual dysfunction but most likely would be a temporary insult from which appellant recovered. Dr. Pacella reiterated that gross examination of the larynx showed good movement of the vocal cords without any lesions and no objective abnormal findings. He opined that the inhalation mucosal injury sustained to his larynx would not be expected to disable appellant from work in 1986 or 1990. Dr. Pacella noted that appellant's condition consisted of persistent hoarseness and chronic laryngitis.

By decision dated October 6, 1994, the Office found that the temporary aggravation of appellant's preexisting condition of chronic laryngitis ceased when appellant stopped work with the employing establishment and his exposure to work factors ended. The Office found that appellant had not established continuing disability since 1985 due to his accepted condition. The Office noted that the evidence pertaining to disability was consistent with the Board's 1988 decision, which had affirmed the denial of wage loss for disability after April 1, 1985. The Office noted, however, that the medical evidence revealed that appellant still had residuals of the 1984 injury, for which he remained entitled to medical benefits. Finally, the Office found that appellant failed to establish that his shoulder, kidney or codeine dependency conditions were causally related to his 1984 injury or subsequent aggravation.

² Appellant stopped work on December 28, 1990.

Appellant requested a hearing before an Office hearing representative by letter dated October 21, 1994. A hearing was held on September 11, 1995.

By decision dated February 15, 1996, the Office hearing representative found that the temporary aggravation of appellant's preexisting throat condition ceased when appellant stopped work at the employing establishment. Further, the hearing representative found no entitlement to compensation for total disability after April 1, 1985. The hearing representative found that the weight of medical opinion as to the nature and extent of the temporary aggravation was represented by the reports of Drs. Gallagher and Pacella. The hearing representative found that appellant remained entitled to medical benefits and supplies for treatment of permanent residuals of his accepted chronic laryngitis, vocal cord scarring and partial vocal cord paralysis. Finally, the hearing representative found that appellant had not established his claim that the use of medication had caused or contributed to codeine dependency, kidney problems or that he had established that his right rotator cuff tear was related to his federal employment.

By letter dated March 15, 1996, appellant requested reconsideration of the February 15, 1996 hearing representative's decision. Appellant contended that the hearing representative's decision was not valid due to various deficiencies and errors he set forth in his letter.

By decision dated April 8, 1996, the Office denied modification of the February 15, 1996 decision.

By letter dated April 16, 1996, appellant disagreed with the April 8, 1996 decision and requested a "reconsideration hearing" and a prehearing conference to be set, again contending the Office had not exercised diligence in the processing of his claim. In response the Office advised appellant to exercise his appellant rights as set forth in the April 8, 1996 decision. By letter dated May 7, 1996, appellant specified that he sought reconsideration, contending error in the Office's processing of his claim.

By decision dated June 13, 1996, the Office denied appellant's reconsideration request finding that the arguments he submitted were of a repetitious nature and insufficient to warrant further merit review of his claim.

By letter dated June 19, 1996, appellant again contended that the Office had not been diligent in the processing of his claim and reiterated his request for a "reconsideration appeal hearing." Appellant subsequently submitted an October 17, 1996 letter to the Branch of Hearings and Review in which he requested review of his claim, making argument that there were multiple violations of applicable regulatory and statutory provisions.

By decision dated November 15, 1996, the Office's Branch of Hearings and Review denied appellant's request for a review of his written record. The Office noted that appellant was not entitled to review under section 8124 as a matter of right as he had previously requested reconsideration under section 8128. The Office exercised its discretionary authority, and found that appellant could submit additional evidence not previously considered with a request for reconsideration of his claim.

The Board finds that the Office properly determined that the aggravation of appellant's preexisting chronic laryngitis was temporary and ceased as of December 28, 1990.

Under the Federal Employees' Compensation Act, when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.³ However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.⁴ Whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁵

In the present case, the Office accepted that appellant sustained chronic laryngitis on December 11, 1984 when he inhaled toxic fumes from a chemical spill. Appellant receive appropriate compensation through April 1, 1985. After his return to work on August 18, 1990 as a data entry clerk, the Office accepted that appellant sustained a temporary aggravation of his throat condition, which ceased when he stopped work on December 28, 1990. This was based on medical evidence from Dr. Gallagher, a Board-certified otolaryngologist. Appellant subsequently submitted a claim for wage loss, contending disability from January 25, 1985. The Board finds, however, that appellant has not submitted sufficient medical evidence in support of his claim.

Appellant submitted a CA-20 claim form by Dr. Markham, who diagnosed chronic laryngitis and marked that appellant was totally disabled since December 11, 1984. The Board has held, however, that a physician's opinion on causal relationship which consists only of checking responses to a form question is of diminished probative value.⁶ Dr. Markham failed to provide any explanation for his medical opinion or discuss the evidence upon which he based his opinion.

Appellant was referred for examination by Dr. Pacella, a Board-certified specialist, who provided reports on October 11, 1993 and April 11, 1994. He reviewed appellant's history of injury and subsequent medical treatment and reported the findings on diagnostic examination. Dr. Pacella stated that fiber optic laryngoscopy revealed good mobility of the vocal cords without any mucosal lesion and that general examination of the head and neck was unremarkable. He diagnosed intermittent laryngitis and hoarseness which he attributed to appellant's 1984 injury. Dr. Pacella noted, however, that appellant's exposure to toner during his employment would not cause any residual dysfunction but represented a temporary insult from which appellant had recovered. He opined that appellant's inhalation injury would not be expected to disable appellant from work.

³ *Larry Warner*, 43 ECAB 1027 (1992).

⁴ *James L. Hearn*, 29 ECAB 278 (1978).

⁵ *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁶ *See Ruth S. Johnson*, 46 ECAB 237 (1994).

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors which enter into such an evaluation include the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.⁷ The Board finds that the weight of medical opinion evidence is represented by the report of Dr. Pacella, who provided a opinion on disability based on a thorough history, medical background and examination of appellant. His report is well reasoned and supports that appellant sustained only a temporary aggravation of his throat condition due to factors of his employment in 1990. The report of Dr. Pacella constitutes competent medical opinion that appellant did not sustain disability for work due to his accepted 1984 injury after January 25, 1985 as claimed. Nor do the reports of Dr. Pacella establish that appellant's kidney condition, codeine dependency or shoulder condition are causally related to either residuals of the 1984 injury or to the 1990 aggravation of his throat condition.

The Board also finds that the Office did not abuse its discretion in denying appellant's request for a hearing.

The Act provides that, before review under section 8128(a), a claimant not satisfied with a decision of the Office has the right, upon timely request, to a hearing before a representative of the Office.⁸ In applying section 8124(b)(1) of the Act, the Board has held that the Office has the discretionary authority to grant a hearing where a claimant is not entitled to a hearing as a matter of right and must exercise that discretion.⁹

In this case, following the October 6, 1994 decision on his claim, appellant was properly advised of his appeal rights and he sought a hearing, which was held on September 11, 1995. Following the Office hearing representative's February 15, 1996 decision, appellant pursued reconsideration before the Office under section 8128(a). Appellant, having exercised his appellate remedies under sections 8124(b) and 8128, no longer had an entitlement to a hearing as a matter of right.¹⁰ In this respect, the record indicates that the Office properly advised appellant of his limited appeal rights in subsequent decisions dated April 8 and June 13, 1996. The Office properly exercised its discretionary authority and advised appellant that he could submit additional evidence on the issue of causal relation with a request for reconsideration. The Board finds that the Office properly denied appellant's request for a hearing.

The Board also finds that the Office properly denied reconsideration on June 13, 1996.

Under 20 C.F.R. § 10.138 (b)(1) a claimant may obtain review of the merits of his claim by written request to the Office and by showing that the Office erroneously applied or

⁷ See *Gary R. Sieber*, 46 ECAB 215 (1994).

⁸ See 5 U.S.C. § 8124(b); *Coral Falcon*, 43 ECAB 915 (1992).

⁹ See *Eileen A. Nelson*, 46 ECAB 377 (1994).

¹⁰ *Id.* at 381.

interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office.¹¹ An application for review which does not meet at least one of these three requirements will be denied by the Office without reviewing the merits of the claim.¹² With his request for reconsideration, appellant contended that the Office hearing representative erred in various ways, delineating minor corrections with the hearing transcript. The Board has also reviewed appellant's allegations pertaining to the Office's processing of his claim and Dr. Gallagher's qualifications and finds that appellant's contentions are irrelevant to the issue of medical causation.¹³ As such, the Office properly denied reopening appellant's claim for further merit review.

The decisions of the Office of Workers' Compensation Programs dated November 15, June 13, April 8 and February 15, 1996 are hereby affirmed.

Dated, Washington, D.C.
October 7, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹¹ 20 C.F.R. § 138.(b)(1).

¹² 20 C.F.R. § 10.138 (b)(2).

¹³ See *Mary Lou Barragy*, 46 ECAB 781 (1995).