

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of IRA E. BROWN and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Martinez, CA

*Docket No. 98-2386; Submitted on the Record;
Issued November 22, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant had any lung condition causally related to his employment after February 10, 1992; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing.

On October 7, 1991 appellant, then a 56-year-old supervisory addiction therapist, filed a claim for compensation alleging that he developed a chronic cough due to exposure to dust and dirt from April to May 1991 while working in an area where there was ongoing reconstruction. Appellant did not stop work.

Accompanying appellant's claim was a medical report dated February 11, 1992 from Dr. George Grossman, an internist, who treated appellant from January 8 to February 10, 1992. He diagnosed chronic reactive airways disease, etiology unknown. Dr. Grossman suspected that exposure to dust at work triggered appellant's airway disease, based on the hearsay of appellant's statement that other employees exposed to the same matter had similar respiratory difficulties. Dr. Grossman indicated that appellant responded well to treatment and, as of February 10, 1992, was essentially symptom free, with minimal cough.

On February 4, 1993 the Office accepted appellant's claim for chronic obstructive airways disease, resolved.

On March 8, 1994 appellant filed a Form CA-7 requesting schedule award and wage-loss compensation for the period May 19, 1991 through the present time. In support of his claim, appellant submitted progress notes from February 22 through November 9, 1995; a chest x-ray dated September 7, 1995;¹ a sinus x-ray dated September 22, 1995; pulmonary function tests dated October 12 and November 9, 1995; and a May 13, 1996 medical report from Dr. Grossman. The progress notes documented persistent sinusitis and bronchitis. The chest

¹ The chest x-ray indicated appellant's history of lymphoma.

x-ray dated September 7, 1995 noted poor respiratory effort with no evidence of active disease. The sinus x-ray indicated no significant abnormalities.

A November 9, 1995 treatment note from Dr. John S. Hardy, Board-certified in internal medicine, to whom appellant was referred by Dr. Grossman, noted appellant's treatment for chronic bronchitis, morbid obesity and sleep apnea. Dr. Hardy opined appellant's "major problem" was his weight, noting that appellant had gained about 180 pounds in 20 years. The pulmonary function test (PFT) of October 12, 1996 indicated moderate restrictive disease. The PFT of November 9, 1995 indicated severe restrictive disease.

Dr. Grossman's medical report of May 13, 1996 documented the history of appellant's illness. He noted that appellant moved to a new office, which was under construction, and was exposed to dust particles from April to the middle of May 1991. Dr. Grossman treated appellant for reactive airways disease in 1992 and had since treated him for asthmatic bronchitis. He indicated that appellant's work exposure to dust "may have been" enough to trigger persistent asthma episodes, but noted that he had no firm objective evidence of this conclusion. Dr. Grossman concluded that the relationship between appellant's employment and his current condition was based on appellant's exposure and subsequent development of the reactive airway disease in a situation where other people were similarly affected.

On December 16, 1996 the Office referred appellant for a second opinion to Dr. Francis T. Healy, Board-certified in internal medicine and pulmonary disease. The Office provided Dr. Healy with appellant's medical records, a statement of accepted facts and detailed description of appellant's employment duties.

In a medical report dated February 12, 1997, Dr. Healy indicated that he reviewed the records provided to him and performed a physical examination of appellant, which included an electrocardiogram, x-rays and pulmonary function studies. He indicated that appellant had a respiratory condition consistent with chronic bronchitis. However, there was no associated obstructive airways disease. Dr. Healy noted that appellant's condition was of uncertain etiology but was not secondary to occupational exposure. He added that appellant's condition could be substantially related to his marked obesity, but that it was improbable that a short-term exposure to a construction site with dust in the air would result in long-term chronic bronchitis.

In a decision dated May 13, 1997, the Office denied appellant's claim on the grounds that the medical evidence established that appellant's lung condition was not causally related to dust exposure at work.

By letter dated May 27, 1997, appellant requested an oral hearing.

By decision dated December 5, 1997, the Office hearing representative vacated the May 13, 1997 decision and remanded the case for further development of the medical evidence. The hearing representative directed that Dr. Healy submit a supplemental report with supporting medical reasoning for his opinion.

In a supplemental medical report dated March 2, 1998, Dr. Healy diagnosed chronic bronchitis, based on his physical examination and appellant's medical history. He concluded that appellant did not have an airway obstruction and opined that, in the absence of an airway

obstruction, a diagnosis of asthma could not be found. Dr. Healy noted that the chronic bronchitis diagnosis was based on appellant's history of coughing and mucus production and advised that his examination did not support a finding of airways inflammation.

Dr. Healy indicated that, while appellant had some dust exposure, there was no history of intense exposure. He concluded that appellant's short exposure to dust was not causally related to his current bronchial condition. He supported his finding by noting that medical literature did not associate relatively short, nonintense exposure to dust as a likely cause of chronic bronchitis or reactive airways disease. Dr. Healy opined that, based on his experience and medical literature, the level of dust exposure experienced by appellant was "unlikely and improbable" to cause a subsequent chronic respiratory condition.

In a decision dated March 5, 1998, the Office denied appellant's claim on the grounds that as the medical evidence was insufficient to establish that the claimed lung condition after February 10, 1992 was causally related to the 1991 work exposure to dust.

By letter postmarked April 29, 1998, appellant requested a hearing before an Office hearing representative. By decision dated June 23, 1998, the Office denied appellant's request for a hearing as not timely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

The Board finds that appellant has failed to establish that he had any work-related lung condition after February 10, 1992.

Appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the period of claimed disability was caused or adversely affected by the employment injury. As part of this burden, he must submit rationalized medical opinion evidence based on a complete factual and medical background showing a causal relationship between his disability and the federal employment. The fact that the condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.²

In this case, the medical evidence submitted in support of appellant's claim for disability compensation is insufficient to establish a continuing work-related medical condition. Although Dr. Grossman opined that appellant's work exposure "may have been sufficient to trigger" persistent asthma episodes, he further stated that he had "no firm objective evidence" for this conclusion. Moreover, Dr. Grossman couched his opinion in speculative terms and did not mention any particular employment factors, such as the duration or intensity of appellant's exposure, as causing appellant's condition.³ Finally, Dr. Grossman did not explain his February 11, 1992 report in which he found appellant to be "essentially symptom free" or

² See *Nicolea Brusco*, 33 ECAB 1138 (1982).

³ See *Leonard J. O'Keefe*, 14 ECAB 42, 28 (1962) (where the Board held that medical opinions based upon an incomplete history or which are speculative or equivocal in character have little probative value.)

address Dr. Hardy's November 9, 1995 treatment note, which attributed appellant's symptoms to his weight. Therefore, the Board finds that Dr. Grossman's report is insufficient to meet appellant's burden of proof.

Dr. Healy's report of February 12, 1997 indicated that appellant had a respiratory condition consistent with chronic bronchitis. He stated that appellant's condition was of uncertain etiology but could be related to appellant's marked obesity. Dr. Healy further indicated that it was improbable that a short-term exposure to a construction site would result in long-term chronic bronchitis.

Dr. Healy subsequently clarified the basis of his opinion that appellant's dust exposure in 1991 was insufficient to result in long-term chronic bronchitis. Dr. Healy explained that, based on his experience and the medical literature, appellant's short, nonintense exposure to construction dust would not cause appellant's condition. He had specific knowledge of appellant's occupational dust exposure and provided persuasive medical rationale for his opinion that appellant's pulmonary condition was not causally related to the 1991 occupational exposure. The Board finds that Dr. Healy's reports represent the weight of the evidence.

The remainder of the medical evidence fails to provide a specific opinion on the causal relationship between the occupational exposure and appellant's diagnosed condition and is thus insufficient to meet appellant's burden of proof.

The Board further finds that the Office properly denied appellant's request for a hearing.

Section 8124(b) of the Federal Employees' Compensation Act,⁴ concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this title is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁵

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.⁶ Even where the hearing request is not timely filed, the Office may within its discretion, grant a hearing and must exercise this discretion.⁷

In this case, the Office properly determined that appellant's request for a hearing postmarked April 29, 1998 was not timely filed as it was made more than 30 days after the issuance of the Office's March 5, 1998 decision. The Office, therefore, properly denied appellant's hearing as a matter of right.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8124(b)(1).

⁶ *Tammy J. Kenow*, 44 ECAB 619 (1993).

⁷ *Id.*

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office found that a hearing was not necessary as the issue in the case was medical and could be resolved through the submission of medical evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as he had other review options available.⁸

The June 23 and March 5, 1998 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
November 22, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

⁸ With his untimely request for a hearing and on appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).