U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID P. RUDROW and DEPARTMENT OF THE ARMY, McALESTER ARMY AMMUNITION PLANT, McAlester, OK

Docket No. 00-1320; Submitted on the Record;
Issued April 3, 2001

DECISION and ORDER

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

The issue is whether appellant is entitled to a schedule award for his medical condition which resulted from an accepted chemical inhalation.

On March 25, 1996 appellant, then a 33-year-old pipefitter, was exposed to a chemical while in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for "chemical inhalation." Appellant reported problems with breathing and coughing and missed a great deal of work. The record reflects that appellant was diagnosed with reactive airways disease and has a significant past medical history for asthma. In a May 16, 1997 Form CA-8 claim for continuing compensation, appellant requested compensation for the period April 13, 1997 onwards. Appellant retired under disability retirement effective June 16, 1997. In a May 16, 1998 Form CA-7, appellant again filed a claim for compensation.[1]

In an August 18, 1998 report, Dr. R.J. Langerman, Jr., a Board-certified osteopath specializing in orthopedics and arthroscopic surgery, stated that appellant has full range of motion of his cervical lumbar spine with only mild tenderness over his right sacroiliac joint. Appellant was released from medical care, but kept on anti-inflammatories. Dr. Langerman opined that appellant had zero percent disability under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition).

By decision dated February 3, 1999, the Office determined that appellant was not entitled to a schedule award for compensation. The determinative weight of the medical evidence rested with the August 18, 1998 report of Dr. Langerman.

The Board finds that this case is not in posture for decision.

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[1] By letters dated July 8 and September 17, 1998, the Office wrote letters intended for a physician, but addressed and directed to appellant. Copies were not sent to a physician.

Under the Federal Employees' Compensation Act,[2] compensation for disability or physical impairment may be paid in only two situations, pursuant to sections 8105 and 8106 for a loss of wage-earning capacity which an employee sustained because of his injury or pursuant to section 8107 for the permanent loss or loss of use of certain specified members or functions of the body by means of a schedule award.[3]

On appeal, appellant argues that Dr. Langerman's report should not have been used as he was examined for his head, back and neck pain and not evaluated for his inhalation injury. In the present case, the Office accepted the March 25, 1996 incident for a work-related "chemical inhalation." There is no indication on the CA-1 form or in the development of the case about any head, back or neck conditions resulting from or related to the March 25, 1996 incident. As such, Dr. Langerman's report is irrelevant to the accepted condition in this case which relates to the respiratory system. The Board notes that, when an employee initially submits supportive factual and/or medical evidence which is not sufficient to carry the burden of proof, the Office must inform the claimant of the defects in proof and grant at least 30 calendar days for the claimant to submit the evidence required to meet the burden of proof. The Office may undertake to develop either factual or medical evidence for determination of the claim.[4] It is well established that proceedings under the Act are not adversarial in nature,[5] and while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.[6] The Office has the obligation to see that justice is done.[7]

In the present case, the Office was obligated to request further information from appellant's treating physician, Dr. Phillip M. Butler, a Board-certified pulmonarist, about the nature and extent of appellant's reactive airways disease. On remand, the Office should further develop the evidence by providing Dr. Butler with a statement of accepted facts and requesting that he submit a rationalized medical opinion on whether appellant's claimed condition is causally related to the identified factors of his federal employment. If the above physician is unavailable to render a rationalized opinion, then the Office should refer appellant with an updated statement of accepted facts to a second opinion physician for a rationalized opinion on the question to be resolved. After such development as the Office deems necessary, a *de novo* decision shall be issued.

[2] 5 U.S.C. §§ 8101-8193.

[3] *Daniel G. Jones*, 27 ECAB 405, 408 (1973).

[4] 20 C.F.R. § 10.11(b); *see also John J. Carlone*, 41 ECAB 354 (1989).

[5] *See, e.g., Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985); *Michael Gallo*, 29 ECAB 159 (1978).

[6] *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

[7] *William J. Cantrell*, 34 ECAB 1233 (1983).

The decision of the Office of Workers' Compensation Programs dated February 3, 1999 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.[8]

Dated, Washington, DC
April 3, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

[8] The Board notes that appellant's appeal to the Board was accompanied by new evidence. The Board's jurisdiction on appeal is limited to a review of the evidence which was in the case record before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c). Therefore, the Board is precluded from reviewing this evidence.