

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEWIN C. HAWKINS and DEPARTMENT OF THE NAVY,
SUPERVISOR OF SHIPBUILDING, Groton, CT

*Docket No. 99-798; Submitted on the Record;
Issued January 29, 2001*

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 entitlement to compensation benefits.

On May 30, 1985 appellant, then a 39-year-old production controller, filed an occupational disease claim alleging that he developed a respiratory condition as a result of exposure to smoke, dust and welding fumes in his federal employment. He was exposed to dust, smoke and fumes to varying degrees from 1977 to 1982, in his position as electrician and ship surveyor (electrician), and from 1982 to 1986 while working as a production controller. Appellant worked in an office environment from 1986 to April 25, 1987, when he retired on disability through the Office of Personnel Management (OPM). On October 7, 1992 the Office accepted appellant's claim for asthma with obstructive pulmonary disease. On December 27, 1994 the Office granted appellant a schedule award for a 10 percent permanent impairment of each lung. On March 20, 1996 appellant elected to receive benefits under the Federal Employees' Compensation Act¹ beginning June 1, 1992. On June 4, 1996 the Office informed appellant that he would receive a check for the difference between his OPM and FECA benefits for the period June 1, 1992 through May 25, 1996 and would be placed on the short-term rolls until March 1, 1997.

On August 28, 1996 the Office issued a notice of proposed termination of compensation and medical benefits. By letter dated September 5, 1996, appellant, through counsel, objected to the Office's proposed action. By decision dated March 6, 1997, the Office terminated appellant's entitlement to compensation and medical benefits on the grounds that he had no residual condition or disability causally related to his accepted employment injury.

¹ 5 U.S.C. §§ 8101-8193.

Appellant requested a hearing before an Office hearing representative, which was held on June 16, 1998. In a decision dated and finalized August 17, 1998, the hearing representative affirmed the Office's March 6, 1997 decision.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not meet its burden of proof to terminate appellant's entitlement to compensation benefits.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.² The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

The Office based its termination of appellant's compensation on the report of Dr. A. David Slutzker, a Board-certified pulmonologist, who provided a second opinion evaluation. In a report dated July 31, 1996, he discussed appellant's history of injury and the medical treatment he received. On physical examination Dr. Slutzker diagnosed, in pertinent part, moderately severe restrictive ventilatory deficit predominantly on the basis of morbid obesity, probable mild obstructive impairment with clinical history suggestive of asthma, and coronary artery disease. Dr. Slutzker went on to state:

"In summary, although [appellant] appears to have had significant exposure to chemical fumes and asbestos it does not appear he has pulmonary asbestosis nor does there appear to be significant interstitial lung disease. I based this on the normal diffusion capacity and arterial oxygen saturation as well as the previously normal maximum oxygen uptake exercise study. He does appear to have restrictive impairment as assessed by pulmonary function testing and given the patient's morbid obesity and marked weight gain in the past 10 years it is difficult to ascertain whether there is any impairment which cannot be blamed on the patient's obesity. The patient's history is suggestive of asthma and whether or not this can be attributed to occupationally-induced asthma with persistent complaints of aggravation of underlying asthma by his occupational problems is difficult. However, at this time the patient does appear to have some obstructive airway disease which may be a combination of asthma as well as underlying obstructive lung disease related to his prior tobacco use."

* * *

"The medical findings reflect a mixed restrictive and obstructive pulmonary deficit. I believe the restrictive deficit is in large part due to the patient's obesity and I do not believe that any significant underlying interstitial lung disease,

² *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

³ *Id.*

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

asbestosis or other pneumoconiosis is likely to be present. I believe the patient's obstructive lung disease is likely a combination of fixed obstruction, possibly related to prior tobacco use, or to asthma."

* * *

"I believe that the patient's restrictive pulmonary dysfunction has continued beyond his retirement. I suspect that the patient's morbid obesity has been the predominant aggravating factor given the persistently normal diffusion capacity as well as radiographic normalcy. I believe the patient's pulmonary function will continue to deteriorate if he is unable to stop gaining weight and it is possible that he will not be able to lose weight given his coronary artery disease and lack of activity.

"I am not convinced that the patient has a work[-]related disability with the exception of his head injury and possibly his asthma. Some occupational induced asthma may persist indefinitely following the initial insult. There is no way to prove whether or not occupational-induced asthma persists at this time.

"I believe the patient has a number of identifiable problems including morbid obesity, coronary artery disease, hypertension, as well as mixed obstructive and restrictive pulmonary dysfunction. The patient appears to have persistent symptoms of shortness of breath which occur intermittently and may be related to his Metropolol use and his mixture of asthma and obesity. I am not convinced that any of his problems are necessarily related to his [f]ederal [e]mployment.

"I believe that the current physical restrictions are predominantly related to his coronary artery disease and obesity. His exercise tolerance is extremely limited and more specifically I believe that heavy lifting, bending, or squatting, exposure to extremes in temperature or fumes should be avoided.

"I believe that the patient should be continued on his cardiac and asthmatic medications. He should be enrolled in some type of exercise rehabilitation program if available in his area and should be encouraged to undergo dietary weight loss...."

On an accompanying work capacity evaluation form (OWCP-5b) dated August 2, 1996, Dr. Slutzker indicated that appellant has numerous physical restrictions due to his nonemployment-related morbid obesity and coronary artery disease. Dr. Slutzker also noted that appellant was "possibly asthmatic," that this condition "may or may not be work related," and indicated by checkmark that appellant's work injury or condition precluded exposure to temperature extremes, airborne particles, gases and fumes.

The Board has carefully reviewed the opinion of Dr. Slutzker and finds that it does not have sufficient reliability, probative value and convincing quality with respect to the conclusions reached regarding whether appellant has any residual condition or disability due to his accepted employment injury of asthma with obstructive lung disease. While Dr. Slutzker clearly believes that the vast majority of appellant's medical problems are due to his nonemployment-related

coronary artery disease and obesity, he cannot rule out the persistence of occupationally-induced asthma and obstructive pulmonary disease, diagnosing probable mild obstructive impairment with clinical history suggestive of asthma and further stating that appellant's obstructive lung disease was "likely a combination of fixed obstruction, possibly related to prior tobacco use or to asthma." He added that he was not convinced that appellant has a work-related disability, "with the exception of ... possibly his asthma." Dr. Slutzker further explained that some occupational-induced asthma may persist indefinitely following the initial exposure, and that there was no way to prove whether or not occupational-induced asthma persists. He concluded that appellant should continue to take asthmatic medication and noted on his work capacity evaluation form that appellant's condition precluded his exposure to gases, dust and fumes.

The test of disability under the Act is whether an employment-related impairment prevents the employee from earning the wages he earned when injured.⁵ Thus, as Dr. Slutzker could not state that appellant's employment-related asthma with obstructive pulmonary disease had ceased, recommended that appellant continue his asthmatic medication, and further stated that appellant was precluded from exposure to fumes, dust and gases, Dr. Slutzker's opinion is not sufficient to meet the Office's burden of proof to terminate appellant's compensation benefits and authorization for medical treatment.⁶

The decision of the Office of Workers' Compensation Programs dated August 17, 1998 is reversed.

Dated, Washington, DC
January 29, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁵ *Marsha K. Stanowski*, 48 ECAB 607 (1997); 20 C.F.R. § 10.5(17) (1998).

⁶ The remaining contemporaneous medical evidence of record is also insufficient to meet the Office's burden of proof. In a report dated November 30, 1995, Dr. Richard B. Weltman, a Board-certified pulmonologist to whom the Office referred appellant prior to referring him to Dr. Slutzker, concluded that appellant's employment did affect his lungs to some degree and may well have contributed to his disability.