

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTHA S. CAVE and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

*Docket No. 00-442; Submitted on the Record;
Issued June 18, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective May 23, 1999 on the grounds that she had no disability due to her employment injury after that date.

This is the third appeal in the present case. In the first appeal, the Board issued a decision¹ on September 16, 1992 in which it set aside the September 16 and February 8, 1991 decisions of the Office and remanded the case to the Office for further proceedings. The Board determined that there was a conflict in the medical evidence between Dr. Harold Lloyd-Wright, an attending physician specializing in general and traumatic surgery, and Dr. Lester W. Blair, a Board-certified internist serving as an Office referral physician, regarding whether appellant had residuals of the employment-related aggravation of her lung condition after January 18, 1990.² The Board remanded the case to the Office for referral to an appropriate medical specialist for an impartial medical examination and an opinion on this matter in order to resolve the conflict in the medical evidence.³ On remand, the Office referred appellant and the case record, to Dr. Albert Miller, a physician Board-certified in internal medicine and pulmonary diseases, for an impartial

¹ Docket No. 92-142.

² In April 1990 appellant, then a 59-year-old letter carrier, filed a claim alleging that she had sustained an employment-related respiratory condition due to exposure to floor resurfacing chemicals and other irritants in her workplace. The Office accepted that appellant sustained an employment-related aggravation of her preexisting chronic obstructive lung disease and paid her compensation through January 18, 1990. The record reflects that appellant was exposed to fumes from acrylic polymers and monomers during tile installation in 1987 and 1988 as well as fumes from other substances, such as gasoline, until she stopped work on January 18, 1990.

³ Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989); 5 U.S.C. § 8123(a).

medical examination and an opinion on whether appellant had residuals of the employment-related aggravation of her lung condition after January 18, 1990.

In the second appeal, the Board issued a decision⁴ on November 6, 1995 in which it reversed the February 18 and October 29, 1993 decisions of the Office. The Board determined that the February 5, 1993 opinion of Dr. Miller, the impartial medical specialist selected to resolve the conflict in the medical opinion, was not entitled to special weight in that it did not contain adequate medical rationale with respect to the relevant issue of the present case. The Board found that, as the Office relied on this opinion in terminating appellant's compensation, it did not meet its burden of proof to justify its termination of appellant's compensation effective January 18, 1990. The Board found that Dr. Miller had not adequately discussed the accepted employment-related aggravation of appellant's chronic obstructive lung disease or explained how this condition had ceased to cause employment-related disability.⁵ The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

After the Board's November 6, 1995 decision, the Office paid appellant disability compensation retroactive to January 19, 1990 and continued to pay her such compensation. By decision dated September 13, 1997, the Office terminated appellant's compensation effective September 14, 1997. The Office based its termination on the opinion of Dr. Steve M. Garman.⁶ By decision dated April 27, 1998, an Office hearing representative reversed the Office's September 13, 1997 decision and reinstated appellant's compensation. He determined that Dr. Garman's opinion did not represent the weight of the medical evidence in that Dr. Garman was not Board-certified and served as an office referral physician. The Office hearing representative noted that there was a continuing conflict in the medical evidence regarding appellant's continuing employment-related disability. He remanded the case to the Office for referral to Dr. Miller for a supplemental opinion or, if it were determined that additional examination and testing was required, for referral to another appropriate specialist.

In January 1999, the Office referred appellant to Dr. George I. Grayson, a physician Board-certified in internal medicine and pulmonary disease, for an impartial medical examination and opinion regarding whether she continued to have disability due to her employment injury, aggravation of chronic obstructive lung disease. By decision dated May 5, 1999, the Office terminated appellant's compensation effective May 23, 1999 on the grounds that she had no disability due to her employment injury after that date. The Office based its termination on the opinion of Dr. Grayson. By decision dated and finalized September 10, 1999, an Office hearing representative affirmed the Office's May 5, 1999 decision.

⁴ Docket No. 94-686.

⁵ The Board also noted that it was unclear whether Dr. Miller had reviewed all the relevant medical evidence.

⁶ Dr. Garman was listed as "Board eligible" in internal medicine but was not yet Board-certified in internal medicine.

The Board finds that the Office properly terminated appellant's compensation effective May 23, 1999 on the grounds that she had no disability due to her employment injury after that date.

Under the Federal Employees' Compensation Act,⁷ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁸ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁹ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background. As noted above, in situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁰

The Board notes that the Office properly referred appellant to Dr. Grayson, a physician Board-certified in internal medicine and pulmonary disease, for an impartial medical examination and an opinion regarding whether she continued to have disability due to her employment injury, aggravation of chronic obstructive lung disease.¹¹ As described above, there was a continuing conflict in the medical evidence regarding this issue.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Grayson, the impartial medical specialist selected to resolve the conflict in the medical opinion. The February 19, 1999 report of Dr. Grayson establishes that appellant had no disability due to her employment injury after May 23, 1999.

In his February 19, 1999 report, Dr. Grayson provided a detailed description of appellant's factual and medical history, including the type of irritants to which she was exposed and the course of her chronic obstructive lung disease. He explained that the single isolation of mycobacterium avium in the bronchial washings most likely represented a false positive finding. Dr. Grayson noted that chest films showed no active disease in the chest but that there were a few calcifications in the hilar structures. He indicated that pulmonary functioning testing normal diffusing capacity and residual volume, which represented 62 percent of total lung capacity.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁹ *Id.*

¹⁰ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹¹ In May 1998 the Office determined that Dr. Miller, the physician Board-certified in internal medicine and pulmonary diseases to whom appellant was previously referred, was no longer practicing medicine. In June 1998, the Office referred appellant to Dr. Ellis Maxey, Jr., a physician Board-certified in internal medicine and pulmonary disease. It was discovered that appellant had seen an associate of Dr. Maxey and, therefore, Dr. Maxey could not serve as an impartial medical examiner; see *Charles M. David*, 43 ECAB 543 (1997).

Dr. Grayson stated:

“Is there any possibility that the work environment aggravated her preexisting illness and now that she is out of the work environment her preexisting illness is back to baseline and no longer aggravated? Certainly this would appear to be the case. As long as she is not being exposed to things in the atmosphere that trigger inflammation and worsen symptoms she is no longer having her disease aggravated and her disease is at its baseline. It should also be noted, however, that if she were to attempt to return to work and be in the same conditions as before that things in the air would begin to worsen her asthma promptly. Thus, it is possible that her condition is no longer exposed, but that she still retains a sensitivity which makes return to work impossible.”

* * *

“My diagnostic impression is chronic obstructive pulmonary disease of severe degree which responds to even more bronchodilator than she is currently taking and obesity. It is my impression that the disease we see today could be entirely attributed to her smoking history, without invoking any work exposures at all and while it is possible that work exposures aggravated her condition while they were occurring, after the work exposures stopped her condition was no longer being aggravated and remains a problem that is the result of her smoking.”

The Board has carefully reviewed the opinion of Dr. Grayson and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Grayson’s opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Grayson provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant’s condition which comported with this analysis.¹² Dr. Grayson provided medical rationale for his opinion by explaining that the type of employment injury appellant sustained would have resolved shortly after she was no longer exposed to irritants in the workplace. He further noted that appellant’s continuing condition could be solely explained by her longstanding, preexisting chronic obstructive lung disease.¹³

¹² See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

¹³ Dr. Grayson indicated that appellant might have respiratory problems if she returned to work, but it is well established that the possibility of future injury constitutes no basis for the payment of compensation; see *Gaeten F. Valenza*, 39 ECAB 1349, 1356 (1988).

The September 10 and May 5, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
June 18, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member