

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN V. SHEPHERD, SR. and DEPARTMENT OF THE AIR FORCE,
McCLELLAN AIR FORCE BASE, Sacramento, CA

*Docket No. 00-2056; Submitted on the Record;
Issued January 22, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has established that he remained disabled for work on and after October 10, 1999 due to the accepted condition of bladder cancer.

On February 12, 1990 appellant, then a 43-year-old aircraft electrician, filed a claim for bladder cancer sustained on or before July 25, 1988, which he attributed to chemical exposures in the performance of his duties as an aircraft mechanic since 1964.¹ The Office of Workers' Compensation Programs accepted the claim for recurrent bladder cancer, with resolved episodes in 1988, 1989 and 1991, requiring surgical removal of tumors on August 18, 1988, May 24, 1989 and February 1, 1991.² The Office found that appellant established that his bladder cancer was

¹ Claim No. 95626-13-0914270.

² The Office initially denied appellant's claim by September 26, 1990 decision, finding that a causal relationship was not established between the accepted chemical exposures and the bladder cancer. In an August 18, 1991 letter, appellant requested reconsideration and submitted additional medical evidence. In an October 23, 1991 report, Dr. Clyde M. Gaffney, a Board-certified urologist and second opinion physician, opined that appellant's recurrence noninvasive transitional cell carcinoma of the bladder was due, in part, to chemical exposures in the performance of duty, in particular to paraffin containing solvents. By decision dated November 15, 1991, the Office vacated the September 26, 1990 decision and accepted the condition of recurrent bladder cancer, with 1988, 1989 and 1991 episodes, due to chemical exposures as an aircraft mechanic in federal employment from 1964 to 1991.

due to occupational chemical exposures, in particular to paraffin containing solvents such as TURCO and JP-4 jet fuel.³

The record demonstrates that appellant had an October 3, 1992 claim accepted for bilateral carpal tunnel syndrome, with permanent restrictions against repetitive hand motions instituted on December 1, 1992. The Office accepted that appellant's duties as an aircraft electrician required frequent repetitive hand motions, with frequent lifting up to 50 pounds. He received a schedule award for a 10 percent impairment of each arm. Appellant also had a claim accepted for tinnitus due to occupational exposure to hazardous noise from aircraft engines and machine tools. These claims are not before the Board on the present appeal.

Appellant was off work intermittently due to bladder cancer beginning July 26, 1988. On May 15, 1991 the employing establishment removed appellant from regular duties of aircraft electrician due to his medical restrictions. Appellant was placed in a light-duty position in a chemical-free environment performing sedentary, clerical work at a retained pay rate. He worked intermittently in 1991 and 1992. In approximately July 1992, the employing establishment advised appellant that there was no light-duty work available within his restrictions of no chemical exposures. Appellant began receiving compensation for temporary total disability on the periodic rolls in August 1992.⁴ The record indicates that appellant was off work through 1996 and received compensation for total disability on the periodic rolls.

In a March 14, 1996 report, Dr. Peter Yip, an attending Board-certified internist specializing in occupational medicine, summarized appellant's treatment and restrictions related to the accepted conditions of bladder cancer, bilateral carpal tunnel syndrome and tinnitus. Dr. Yip noted that appellant was treated for bilateral carpal tunnel syndrome by Dr. W.B. Powers, Jr., a Board-certified hand surgeon, beginning on December 1, 1992. Dr. Powers permanently restricted appellant from performing repetitive hand motions for more than one-third of the workday, for no more than 30 to 45 minutes at a time.⁵ Appellant was initially diagnosed with bladder cancer in August 1988, with recurrences in June 1989 and January 1991. Dr. Deepak Chabra, an attending Board-certified urologist, found a causal relationship between appellant's occupational exposure to paraffin-containing solvents and the development and recurrence of bladder cancer. Dr. Yip explained that "paraffins are bladder carcinogenic," and were "contained in TURCO, a common solvent and JP-4, which is jet fuel.... Therefore, as of April 18, 1991 and ongoing, [appellant] was placed on permanent restriction of no significant exposures to TURCO, JP-4 or other paraffin containing solvents. This was in an

³ The Office accepted that appellant was exposed to "ethanol, isopropanol, methyl ethyl ketone, methyl isobutyl ketone, toluene, ethyl acetate, isopropyl acetate, butyl cellosolve, xylene, 2-pentatone, chlorobenzene, dichlorobenzene, trichlorotrifluoroethane and TURCO solvent," and at times by the end of his shift would be "soaked in aircraft fuel ... composed primarily of kerosene/paraffin," and "contaminants from Teflon tubing and polyurethane insulated wire" including fluorine, cyanide and oxides of nitrogen. Appellant was also exposed to tin and lead solder, with decomposition products of acetone, methyl alcohol, aliphatic aldehydes, carbon monoxide, carbon dioxide, methane, ethane, abietic acid and diterpine acids.

⁴ The carpal tunnel syndrome claim was assigned No.13-0998242 and the tinnitus No. 13-1081960.

⁵ In a March 21, 1996 report, Dr. Powers noted that anything more than "minimal use of his hands" would cause a recurrence of the accepted bilateral carpal syndrome.

effort to minimize the risk of recurrent bladder cancers.” Regarding appellant’s bilateral tinnitus, Dr. Morrow, the attending otolaryngologist, advised that appellant should not exceed the 85 decibel exposure limit recommended by Occupational Safety and Health Administration (OSHA). Dr. Yip recommended vocational training for a position in an office setting, as such an environment would not contain hazards from excessive noise, solvents and could be modified to fit his restrictions regarding repetitive hand motions.

In a September 10, 1996 closure report, Mark Kwoka, a rehabilitation counselor, found appellant unable to “benefit from vocational rehabilitation services” due to multiple injuries and restrictions.⁶ Appellant could not use “his hands for more than a few minutes before his hands hurt and go numb,” and could only type for 30 to 40 minutes. Due to tinnitus, appellant was “unable to track conversations or listen in a classroom setting ... which would preclude his participation in a formal training program.” Restrictions against chemical exposure would preclude him for working with hydrocarbons or exposure to commuter traffic, which would make vocational placement difficult.

On April 21, 1999 appellant’s case was placed on the periodic rolls regarding the bladder cancer claim.

In a May 25, 1999 report, Dr. Chabra stated that routine cystoscopy showed “no evidence of recurrent tumor growth.” Dr. Chabra noted that appellant had remained free of bladder cancer since January 1991 surgery.

By notice dated July 22, 1999, the Office advised appellant that it proposed to terminate his compensation on the grounds that the accepted condition had ceased, based on Dr. Chabra’s May 25, 1999 finding that appellant had no bladder tumors since 1991.

Appellant submitted additional evidence in response to the July 22, 1999 notice.

In an August 12, 1999 report, Dr. Yip noted Dr. Chabra’s May 25, 1999 report finding no clinical recurrence of bladder cancer. Dr. Yip, as of June 4, 1991, had permanently restricted appellant “from any significant exposure to TURCO, JP-4 or other paraffin-containing solvents, as these chemicals have been noted to be carcinogenic to the bladder. Even though he has not had a recurrence of his bladder cancer, one would not discontinue this restriction, much like one would not encourage a patient recovering from lung cancer to restart his smoking.” Dr. Yip noted that appellant should not exceed the maximum OSHA standards for noise exposure due to his tinnitus and restricted appellant to only occasional repetitive hand movements due to carpal tunnel syndrome.

By decision dated October 5, 1999, the Office terminated appellant’s wage-loss compensation effective October 10, 1999 on the grounds that his accepted bladder cancer had ceased. The Office noted that Dr. Yip discussed appellant’s carpal tunnel syndrome and tinnitus in addition to his bladder cancer. He found that appellant had been free of bladder cancer since

⁶ Appellant received vocational rehabilitation services from November 9, 1995 to August 1996. In a September 18, 1996 report, an Office rehabilitation specialist closed the rehabilitation effort.

surgical removal of his tumors in 1991. The Office noted that the issue was whether appellant's condition had ceased and not if it might recur, as fear of future injury was not compensable. The Office noted that appellant's claims for tinnitus and carpal tunnel syndrome were not at issue.

Appellant disagreed with this decision and in an October 17, 1999 letter requested reconsideration. Appellant argued that all physicians of record concurred that his bladder cancer was due to chemical exposures and that continued exposure was likely to cause a recurrence. Dr. Yip, therefore, permanently prohibited his exposure to any paraffin-containing substances and that he thus could not return to work in his preinjury position as his duties would entail continued chemical exposure. Appellant also asserted that his accepted bilateral carpal tunnel syndrome prevented him from performing the duties of an aircraft electrician. He noted that vocational rehabilitation efforts were closed in September 1996 as it was found he could not return to work due to his multiple accepted conditions. Appellant also noted that the employing establishment had no work available within his restrictions.⁷

By decision dated March 20, 2000, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. The Office found that appellant's October 17, 1999 letter and Dr. Yip's August 12, 1999 report "failed to establish error in law or fact with our previous decision."

The Board finds that appellant has not established that he remained disabled for work on and after October 10, 1999 due to the accepted condition of bladder cancer.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination 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 includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁰

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability, which continued after termination of compensation benefits.¹¹

In this case, the Office accepted that appellant sustained bladder cancer on or before July 25, 1988, with resolved episodes in 1988, 1989 and 1991. The Office based its termination

⁷ On October 10, 1999 appellant began receiving retirement benefits under the Office of Personnel Management (OPM). Compensation payments were terminated as of that date.

⁸ *Raymond W. Behrens*, 50 ECAB 221 (1999).

⁹ *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

¹⁰ *Raymond W. Behrens*, *supra* note 8.

¹¹ *Talmdge Miller*, 47 ECAB 673, 679 (1996).

of compensation on the May 25, 1999 report of Dr. Chabra, an attending Board-certified urologist. He stated that routine cystoscopy performed that day showed “no evidence of recurrent tumor growth.” Dr. Chabra explained that appellant had been free of bladder cancer since surgical tumor removal in January 1991. Additionally, Dr. Yip, an attending Board-certified internist, stated in an August 12, 1999 report that appellant had no recurrence of bladder cancer after 1991. Thus, appellant’s own physicians stated unequivocally that the accepted condition of bladder cancer had resolved without residuals. The Board finds that Drs. Chabra’s and Yip’s reports comprise a sufficient predicate on which to base the Office’s termination of compensation.

As the Office has met its burden of proof in terminating appellant’s compensation benefits effective October 10, 1999, the burden then shifted to appellant.

Following the October 5, 1999 decision, appellant submitted an October 17, 1999 letter requesting reconsideration. He asserted that Drs. Chabra’s and Yip’s permanent restrictions against his exposure to jet fuel, TURCO solvent and other paraffin containing substances in effect disabled him from working as an aircraft electrician, as his duties would require continuous contact with such chemicals. The record demonstrates that the restrictions against chemical exposure resulted in his May 15, 1991 transfer to a sedentary, clerical position away from the aircraft maintenance area. Also, the employing establishment asserted that there was no work available within appellant’s restrictions as of July 1992.

However, as the Office found in its March 20, 2000 decision, appellant did not establish that he was disabled on and after October 10, 1999 due to bladder cancer, as the accepted condition ceased in 1991. Appellant’s fear of future injury is not compensable.¹² Additionally, appellant’s physicians did not assert that the bladder cancer caused a permanent condition that would render him disabled for work, or that appellant’s risk of recurrence was greater than that of any other individual.

Consequently, appellant failed to establish disability for work on and after October 10, 1999 due to accepted bladder cancer, as he did not submit sufficient medical evidence to establish any continuing medical condition.

¹² *Paul A. Clarke*, 43 ECAB 940 (1992).

The March 20, 2000 and October 5, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
January 22, 2002

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member