U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAULA J. GRIEVE and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Great Falls, MT

Docket No. 01-499; Submitted on the Record;
Issued November 8, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that residuals of appellant's employment injury ceased by December 6, 1998.

On April 2, 1990 appellant, a 45-year-old contact representative, filed a claim alleging that she developed "severe asthma due to passive smoking" at work on or prior to April 1, 1978. The Office accepted the claim for chronic asthmatic bronchitis. Appellant stopped work on October 13, 1989 and received compensation on the periodic rolls. The Office also accepted appellant's claim for aggravation of asthma.

By decision dated November 16, 1998, the Office terminated appellant's monetary and medical compensation benefits effective December 6, 1998. The Office accorded the weight of the medical opinion evidence to Dr. Timothy Kennedy, an Office referral physician, Board-certified in pulmonary disease. In a decision dated August 23, 1999, an Office hearing representative affirmed the termination of monetary benefits, but reversed the termination of medical benefits and directed reinstatement of medical benefits. In a decision dated August 17, 2000, the Office denied modification.

The Board finds that the Office properly determined that appellant's employment injury had resolved by December 6, 1998.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[1]

Appellant's treating physicians, Dr. Susan Avery, a Board-certified family practitioner, and Dr. David Anderson, a Board-certified internist specializing in pulmonary care, opined that

[1] *Patricia A. Keller*, 45 ECAB 278 (1993).

appellant's asthma was controllable so long as she took medications and avoided certain environments. Drs. Avery and Anderson further opined that appellant was not capable of returning to work in her previous capacity, noting that her condition would be exacerbated by exposure to viruses in a public workplace and having to deal with people.

In a report dated May 5, 1998, Dr. Kennedy noted the history of injury and appellant's medical history. He noted the findings on physical examination. Recent pulmonary function tests revealed a mild airflow obstruction disorder with a slight degree of airway reactivity. Dr. Kennedy opined that this was compatible with asthma in remission. Chest x-rays showed minimal hyperinflation and what appeared to be a lingual scar that has been present and stable since 1990. Dr. Kennedy opined that there was substantial evidence for chronic asthmatic bronchitis, which was now quite well controlled on nearly optimal medical management. He further opined that in the workplace, appellant should have a relatively pollution-free environment in order to function once again as a worker. He opined that she could function without significant pulmonary disability. Dr. Kennedy noted that he was not able to judge any neuropsychiatric disability. By letter dated May 29, 1998, the Office sent Dr. Kennedy a statement of accepted facts and requested that he respond to several questions. In a report dated September 4, 1998, Dr. Kennedy opined that appellant did not have any disabling residuals from exposure to smoke she experienced during her employment. He noted that she was able to lead a relatively normal life and her pulmonary function tests, which were slightly abnormal, were not abnormal enough to cause significant disability. Dr. Kennedy also opined that appellant could return to work as a contact representative with the current knowledge that all smoking was banned from the federal workplace. Dr. Kennedy stated that there were no restrictions from a respiratory viewpoint with the exception that smoking be banned from the workplace. He noted that appellant had concerns about other chemicals in the workplace, but stated that based on the assumption that reasonable care was taken to manage this issue, he saw no reason why appellant's workplace would not be safe for her to function productively.

Under the Federal Employees' Compensation Act, when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.[2] When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation ceased.[3] If the employment exposure causes a permanent condition, such as a heightened sensitivity to a wider field of allergens, the claimant may be entitled to continuing compensation;[4] a medical restriction that is based on a fear of future aggravation due to employment exposure is not employment related.[5]

The Board finds that Dr. Kennedy, the referral physician who is Board-certified in pulmonary disease, offered a reasoned medical opinion finding the employment-related

[2] *Mary A. Moultry*, 48 ECAB 566 (1997).

[3] *Id.*

[4] *James C. Ross*, 45 ECAB 424 (1994); *Gerald D. Alpaugh*, 31 ECAB 589 (1980).

[5] *Gaetan F. Valenza*, 39 ECAB 1349 (1988).

aggravation had ceased. He noted appellant's medical history, conducted a physical examination along with objective studies and opined that appellant's chronic asthmatic bronchitis was well controlled on nearly optimal medical management and that appellant would be able to function in the workplace without significant pulmonary disability. After the medical record, statement of accepted facts and a list of questions were received, Dr. Kennedy reiterated his opinion that appellant could return to work as there were no disabling residual from her previous exposure to smoke as evidenced by the pulmonary function tests, which were not abnormal enough to cause a significant disability. He noted that as smoking was banned from the federal workplace, appellant could return to her former position.

At the time of termination, appellant did not submit any probative evidence establishing that her employment-related condition was continuing or permanently aggravated. In his October 6, 1998 report, Dr. Anderson stated that one of the aggravants, which worsened appellant's asthma, which was not discussed in Dr. Kennedy's report, was that of recurrent respiratory infections. He advised that he was enclosing copies of his records, which documented that whenever appellant developed a respiratory infection, which was most often viral, there would be an exacerbation of her asthma and she would need to go on a corticosteroid. Dr. Anderson noted that since appellant has avoided situations where she was exposed to infections, her asthma had been well controlled. He noted that on his last evaluation of appellant on July 14, 1998, she has not had an exacerbation of asthma since February or March 1997. Dr. Anderson noted that that was also the last time she had a respiratory infection. He opined that it would be very risky for appellant to return to work in public places such as the Social Security Office as she would likely have considerable exposure to respiratory infections, especially certain times of the year. Consequently, appellant would be at risk for severe worsening of her asthma symptoms. Dr. Anderson further opined that if appellant could work in a situation where she would have no exposure to people who have respiratory infections, doing the kind of work that she is trained to do, then certainly she could return to work.

In her October 23, 1998 medical report, Dr. Avery noted that she reviewed her records and concurred with Dr. Anderson that it would be risky for appellant to return to work where she would be exposed to recurrent respiratory infections as well as possible exposure to smoke or any other pollutants. She noted that appellant had markedly modified her life-style so that she avoided people and air pollutants. Dr. Avery noted that whenever appellant had a respiratory infection, usually viral, she had a decrease in her peak flow and an exacerbation of her asthma.

Both Drs. Avery's and Anderson's reports establish that appellant's asthma is under control and that problems could arise when she is exposed to viruses, which cause respiratory infections. A restriction based on the fear of future aggravation or injury is not compensible.[6] Moreover, to opine that appellant's return to the Social Security Office would increase the risk of appellant contacting a respiratory infection is purely speculative and unsupported by medical rationale. The Board has found that a conclusory statement without supporting rationale is of little probative value[7] and is insufficient to discharge appellant's burden of proof. Dr. Kennedy

[6] *See Joseph G. Cutrufello*, 46 ECAB 285 (1994).

[7] *Marilyn D. Polk*, 44 ECAB 673 (1993).

clearly noted that appellant would be able to function in a relatively pollution free environment, which is consistent with the recommendations of Drs. Avery and Anderson. The Board finds the weight of the medical evidence rests with Dr. Kennedy. The Board finds that the Office met its burden of proof to terminate monetary compensation benefits on December 6, 1998.

Appellant's attorney contends that the termination of compensation benefits was in error. Although her attorney has argued that the current medical evidence demonstrates that she is unable to return to work, the Office properly found this argument to be irrelevant as the issue to be addressed in this case was whether the termination of appellant's wage-loss compensation was appropriate as the residuals of her employment injury had ceased by December 6, 1998. The burden of proof thereafter shifts to appellant to show that her current condition is causally related to employment factors. The current medical reports of record fail to show that her medical condition is due to any continuing and recurrent asthma-induced impairment, the condition, which the Office accepted. All the physicians of record, including Dr. Kennedy, the Office referral physician, have opined that appellant is able to function in a relatively pollution free environment. There is no medical evidence showing that appellant's recurrent respiratory infections have worsened or permanently aggravated her asthma, which all the physicians of record indicated was medically controlled. A restriction based on fear of future injury is not compensable.

Appellant's attorney further noted that the January 10, 1995 medical report of Dr. James V. English, a clinical neuropsychologist, indicated that she suffered mental and cognitive deficits, which arose out of hypoxia due to asthma. He contended that, this report was not properly addressed by the Office. In his report of January 10, 1995, he noted that appellant was diagnosed with severe bronchial asthma and was admitted to the hospital with status asthmaticus secondary to noncompliance with her medical regimen. Dr. English further noted that of significance was a respiratory arrest, which occurred in March 1994 with an unknown amount of time without breathing, resulting in a possible anoxia. After describing the results of his neuropsychological evaluation, Dr. English diagnosed generalized cognitive impairment secondary to an anoxia and ongoing asthmatic condition. He stated that the pattern of diffuse cerebral impairment was most consistent with an anoxic event appellant suffered in March 1994. He recommended biofeedback training, medication and ongoing cognitive training to reinforce in a behavioral program compliance with medication regimen.

Although appellant's attorney notes that it appears from Dr. English's report that such mental and cognitive deficits are permanent, the report is devoid of any opinion supported by medical rationale which causally relates appellant's cognitive condition to her employment-related asthma. As Dr. English's report is devoid of rationale sufficient to establish a causal connection with appellant's employment-related asthma, this report is of diminished probative value.

The decision of the Office of Workers' Compensation Programs dated August 17, 2000 is hereby affirmed.

Dated, Washington, DC
November 8, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member