

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUGENE GRIFFIN and U.S. POSTAL SERVICE,
POST OFFICE, Richmond, CA

*Docket No. 02-993; Submitted on the Record;
Issued October 15, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has any permanent impairment of his preexisting asthmatic condition from exposure to dust on March 27, 1998 that would entitle him to a schedule award.

On March 27, 1998 appellant, then a 54-year-old custodial group leader, was injured in the performance of duty when he rode his bicycle through a cloud of dust being blown from steel beams and suffered an asthma attack. The Office of Workers' Compensation Programs accepted the claim for acute asthma, single episode. Appellant received compensation for intermittent periods of total disability for work. He returned to full-time duty in a modified position effective August 10, 1998.

In a report dated July 30, 1998, Dr. Donald C. Rifas, a Board-certified pulmonary specialist, noted a history of asthma for two years. Dr. Rifas related that appellant became sick at work after inhaling dust while riding his bicycle through a cloud of dust on March 27, 1998. He indicated that appellant's asthmatic condition was aggravated by the March 27, 1998 dust exposure but that without additional pulmonary function testing and analysis of the composition of the dust cloud, there was insufficient information to reach a conclusion as to whether appellant had any permanent respiratory impairment. Dr. Rifas opined that appellant was capable of sedentary work with no further dust exposure.

In a treatment note dated November 12, 1998, Dr. Rifas indicated that appellant had undergone a pulmonary exercise stress test two days prior and had been diagnosed with cardiomyopathy. A pulmonary function study dated November 10, 1998 was noted as showing restrictive and mild obstructive disease.

On July 9, 1999 appellant filed a Form CA-7 claim for a schedule award.

The Office referred appellant for a second opinion evaluation with Dr. Deepak Shrivastava, a Board-certified internist, on October 14, 1999. In a report dated November 26, 1999, Dr. Shrivastava discussed appellant's description of the work injury, the medical record

and his recurring symptoms of shortness of breath, chest tightness and chronic cough. He specifically noted that, while appellant denied a prior history of asthma before the work injury of March 24, 1998, medical records from Dr. Rass recorded asthmatic symptoms for two years prior. On physical examination there were no abnormal respiratory findings. A spirometry test dated November 8, 1999 attached to his report was interpreted as showing mild to moderate obstructive airway disease. Dr. Shrivastava stated that appellant “may have a preexisting asthma condition which became aggravated at least temporarily by his exposure to the dust cloud, although his pulmonary condition and symptoms are also aggravated by his body habitus, morbid obesity, sleep apnea and perhaps deconditioning.” He concluded that appellant suffered from mild obstructive airway disease with no permanent functional loss of lung function that could be causally related to the March 27, 1998 work injury.

A copy of Dr. Shrivastava’s report was sent to an Office medical adviser for comment. In a report dated December 15, 1999, the Office medical adviser stated:

“It is likely that a preexisting condition of asthma would be only temporarily aggravated by exposure to dust. Temporary aggravation would likely last for a few hours or perhaps one or two days depending on the severity of the exposure and the activity of the underlying condition. Any ongoing problem the claimant would have after March 30, 1998 would likely be due to his underlying condition and not factors of his federal employment. The degree of respiratory impairment secondary to asthma related to factors of federal employment would be [zero percent].”

In a decision dated January 26, 2000, the Office denied appellant’s claim for a schedule award.

Appellant requested a hearing, which was held on June 29, 2000.

In a decision dated September 19, 2000, an Office hearing representative affirmed the Office’s January 26, 2000 decision.

In an October 23, 2000 letter, appellant by counsel requested reconsideration and submitted a report from Dr. Thomas Edward Gamsky, a Board-certified internist, dated August 22, 2000. Dr. Gamsky noted that appellant described an episodic dust exposure temporarily correlating with an increase in symptoms of bronchitis and worsening asthma. He stated that there appeared to be significant intermittent exposure to mixed dust in appellant’s work environment and that appellant’s asthma and chronic bronchitis are aggravated by his dust exposure. With respect to the March 27, 1998 dust exposure, he opined that the work injury caused a progression of appellant’s respiratory condition and resulted in a worsening of his symptoms. He concluded that the March 27, 1998 work injury permanently aggravated appellant’s asthma.

The Office determined that a conflict existed in the medical record and referred appellant along with a copy of the medical record and a statement of accepted facts to Dr. Revel Cayton, a Board-certified internist, for an impartial medical evaluation on December 20, 2000.

In a report dated February 2, 2001, Dr. Cayton related appellant's history of shortness of breath and wheezing as having occurred over the past 15 years following exposure to dust in the workplace. He further related that appellant described having been prescribed an inhaler six years prior by a physician because of bronchospasm and that appellant complained of having become dependent upon it. Dr. Cayton reported findings on physical examination, pulmonary function and allergy testing. He found zero contribution of appellant's work injury to his permanent respiratory disability and stated as follows:

“It is certainly reasonable to assume that a discrete episode of dust inhalation could cause a temporary exacerbation of [appellant's] nonoccupational asthma. Giving [him] the benefit of the doubt, it is reasonable to assume there was a week to 10 days of increasing shortness of breath on the basis of this dust exposure. Having said that, this dust exposure did not in any way qualitatively change the nature, course or intensity of [appellant's] nonoccupational asthma.”

In a decision dated February 22, 2001, the Office denied modification of its prior decisions.

Section 8107 of the Federal Employees' Compensation Act, provides a compensation schedule for payment of awards for permanent impairment of listed members. The schedule establishes how many weeks of compensation an employee will receive in the event of total functional loss or dismemberment of certain bodily members. Partial loss of function of the bodily member is awarded for a proportionate number of weeks. The scheduled payment represents the maximum compensation payable under the Act for impairment incurred by a federal employee for injury sustained while in the performance of duty.¹

In this case, the Office properly determined that appellant was not entitled to a schedule award because the weight of the medical evidence established that he did not sustain any permanent impairment as a result of his work injury. The Board notes that the Office correctly determined that a conflict existed in the record between Drs. Gamsky and Shrivastava as to whether appellant suffered a temporary or permanent aggravation of his preexisting asthmatic condition after being exposed to a dust cloud at work on March 27, 1998. The Office in accordance with appropriate procedures sent appellant for an impartial medical evaluation with Dr. Cayton who opined that appellant suffered no permanent residuals due to the accepted work injury. He opined that it was reasonable to assume that appellant's dust exposure on March 27, 1998 caused only a temporary exacerbation of his preexisting and nonoccupational asthma. He estimated that the temporary aggravation lasted one week to 10 days.

Section 8123 of the Act proves that, 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.² Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper

¹ *Harry D. Butler*, 43 ECAB 859 (1992).

² *Leanne E. Maynard*, 43 ECAB 482 (1992); *Robert P. Johnson*, 43 ECAB 260 (1991).

factual background, is entitled to special weight.³ Because the Board finds that Dr. Clayton's opinion is well rationalized and based on a proper factual background, the Board assigns his opinion special weight and concludes that appellant suffered no permanent impairment as a result of his accepted work injury. Thus, the Board finds that appellant is not entitled to a schedule award.

The decision of the Office of Workers' Compensation Programs dated February 22, 2001 is hereby affirmed.

Dated, Washington, DC
October 15, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

³ *Id.*