

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JANELLE DICAPRIO and U.S. POSTAL SERVICE,  
POST OFFICE, Miami, FL

*Docket No. 01-1719; Submitted on the Record;  
Issued March 25, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established that she sustained a respiratory condition causally related to factors of her federal employment; and (2) whether the Office of Workers' Compensation Programs, in its February 27, 2001 and January 24, 2001 decisions, properly denied appellant's requests for reconsideration under 5 U.S.C. § 8128.

On December 15, 1995 appellant, then a 49-year-old bulk mail technician, filed an occupational disease claim alleging that she sustained severe headaches, chest pain, coughing, sneezing and eye irritation causally related to factors of her federal employment. In a statement accompanying her claim, appellant related:

“On or about the end of March 1995 work was being performed on the air conditioning unit at the office where I work. The first day the work began I started experiencing difficulty in breathing, headaches, [a] nasal burning sensation and chest pains. I went to the medical unit at the [employing establishment]. I thought that since I had scheduled vacation from April 1, 1995 that maybe the symptoms would go away but they persisted so I attended a doctor and I am still under his care.”

In a report dated June 22, 1995, from Dr. F.D. Khani, an osteopath, he indicated that appellant related a history of “severe bronchial asthma due to chemical[s] released and other pollutants into the air while at her place of employment. [Appellant] has had this breathing problem since March 1995.” Dr. Khani related that x-rays showed chronic bronchitis and asthmatic bronchitis. He stated: “In my opinion, [appellant] is exposed to internal pollutants and other chemicals at her job, which has caused this condition or has aggravated this condition.”

In form reports dated December 21, 1995, Dr. Khani diagnosed acute bronchitis and asthmatic bronchitis and checked “yes” that the condition was caused or aggravated by employment. He provided as a rationale that appellant was “exposed to internal pollutants and other chemicals where there [were] repairs going on.”

In duty status reports dated February 10 through June 6, 1996, Dr. Khani noted that appellant had congested lungs with rales and difficulty breathing and found that she was totally disabled from employment.

By decision dated June 12, 1996, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that she sustained an injury causally related to the claimed employment factors. The Office noted that neither appellant nor her physician had identified the pollutants to which she claimed exposure.

Appellant requested a hearing on July 12, 1996. In an undated decision, the hearing representative vacated the Office's June 12, 1996 decision and remanded the case for the Office to obtain information from the employing establishment regarding air quality information, the air conditioning work done and appellant's occupational exposure. The hearing representative instructed the Office to refer appellant to an appropriate medical specialist upon receipt of the requested information.

In an April 30, 1999 memorandum of a conference between the Office and the employing establishment, an official with the employing establishment stated that there was conflicting information regarding whether air condition repair work was performed between March and December 1995. She stated that a June 6, 1995 note from the employing establishment's medical clinic indicated that appellant complained of respiratory problems due to air conditioning work performed on May 24, 1995. The official also stated that appellant was in a leave status from April 1 to May 30, 1995. The official indicated that it did not have air quality results for the period March to December 1995 but that tests in November 1994, 1996 and 1998 showed dust on surfaces within Occupational Safety and Health Administration (OSHA) standards.

The employing establishment submitted a letter dated May 26, 1999 from the contractor who performed an upgrade on the air conditioning system at the employing establishment. The contractor estimated that the company had performed air conditioning work in appellant's area for one week in mid-March 1995. He stated that his work "was to install the unit and connect the existing duct system. Both operations are totally clean and free from any hazardous materials that could affect the environment." The contractor further stated that "from our scope of work, you cannot expect any sort of air contamination to the area in question." The employing establishment also submitted the results of air quality tests from 1994, 1996 and 1999, which revealed air quality within OSHA guidelines.<sup>1</sup>

By letter dated November 1, 1999, the Office requested that Dr. Khani review the material submitted from the employing establishment regarding air quality. The Office further noted that appellant alleged that the work began near the end of March 1995 and that she was on leave from April 1 until May 31, 1995.

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<sup>1</sup> The employing establishment further submitted a clinic note dated June 6, 1995 in which appellant stated that "on May 24, 1995 the air conditioning in her office was being replaced [and] she was inhaling the dust and fumes."

In a report dated December 1, 1999, Dr. Khani recommended disability retirement for appellant. He diagnosed acute bronchitis and asthmatic bronchitis and stated:

“[Appellant] has suffered with this illness for sometime, but her conditions of work with the [employing establishment] [since] 1975 have severely exacerbated her conditions. With the slightest of exposure to any dust, molds, chemicals or other pollutants, [appellant] immediately suffers from shortness of breath, wheezing, chest pains, headaches and nasal burning, as well as other flu and allergy symptoms. A review of the job roles provided from the [employing establishment] and the repeated need for medical attention and absences from work for many years prior, clearly demonstrates to me that [appellant] is in great need of disability retirement from the [employing establishment]....”

“It must be noted that since her exposure to work performed within her work location, by outside contractors, to the [air condition] system, in March 1995, [appellant’s] conditions have become so great that she has been unable to recover enough to return to work since that time. Although she has filed a claim with [the Office], since the work was done by outside contractors and no one has provided the name of the chemicals, pollutants, etc. [etceteras] that caused such a severe reaction by [appellant], the [Office] cannot approve [her] claim, as they have stated. Although [she] sought immediate attention a[nd] was diagnosed with job related/aggravated condition due to such exposure, apparently it is required that you specifically identify by name what the person was exposed to in order to be successful in your claim for compensation, notwithstanding the presence of any medical conditions and/or reactions to same. Based on [appellant’s] medical records and conditions and the fact of 20 years of continued exposure to the dust, chemicals, etc., known to be in the [employing establishment’s] environment, I do not find it in her best interest to continue to expose herself and jeopardize her health and family. She is in great need of disability benefits due to the fact that her conditions are permanent and any continued exposure may even cause further health problems.”

By letter dated March 22, 2000, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Joseph A. Giaimo, an osteopath, for a second opinion evaluation. The Office noted that there was a question of whether the air condition work was performed in March 1995 or in May 1995 as indicated by appellant in the June 5, 1995 clinic note from the employing establishment.

In a report dated May 10, 2000, Dr. Giaimo listed findings on examination and diagnosed chronic bronchitis, a history of seizure disorder and probably sinusitis. Dr. Giaimo related:

“[I]t is impossible at this time to determine what has exacerbated [appellant’s] respiratory condition. If pulmonary function tests can be obtain they may determine the degree of [appellant’s] underlying pulmonary difficulty and the degree of airway obstruction. These findings would be abnormal in a patient with chronic bronchitis and also related to any environmental exposure, therefore, we

cannot definitely state that [appellant's] exposure was causative in the exacerbation of her underlying reactive airways disease.”

Dr. Giaimo noted that the results of air quality tests at the employing establishment did not show “evidence of significant allergens or pollutants....” He further noted that appellant’s symptoms should have “vastly improved” prior to her visit to Dr. Khani in May 1995 unless she had continuing exposure. Regarding the discrepancy between the dates that the air condition was repaired, March or May 1995, Dr. Giaimo stated:

“[Appellant] relates [that] her symptomatology has been of long[-]standing with her respiratory difficulties, indeed, with her first evidence of pneumonia and sinusitis in the 1980’s, any specific exposure at this time related to her environment seems less likely. This may just be an exacerbation of her unfortunate chronic illness. Any documentation on pulmonary function tests would be helpful regarding this. Upon review of the records it appears [that] [appellant] has had a long[-]standing history of chronic bronchitis and sinopulmonary syndrome. Any exacerbations of this do not seem to be related to her work space.”

In a supplemental report dated June 21, 2000, Dr. Giaimo noted that pulmonary function tests and blood gas studies performed on June 9, 2000 showed “no evidence of large airway obstruction.” He noted that lung capacity studies were not obtained and, therefore, he could not comment on any potential restrictive lung impairment. Dr. Giaimo stated: “The impression of [appellant’s] pulmonary function tests were essentially unremarkable and I would agree with this. Therefore, no demonstrable pulmonary dysfunction is noted at this time.”

In a decision dated July 20, 2000, the Office denied appellant’s claim on the grounds that the medical evidence was insufficient to establish that her current medical condition was causally related to employment.

On January 9, 2001 appellant requested reconsideration of her claim. In support of her request, she submitted responses to questionnaires from coworkers regarding the air conditioning work performed in March 1995 and a 1975 report concerning findings of asbestos at appellant’s worksite.

By decision dated January 24, 2001, the Office denied merit review of its July 20, 2000 decision. Appellant again requested reconsideration by letter dated February 5, 2001 and resubmitted Dr. Khani’s June 22, 1995 medical report.

In a decision dated February 27, 2001, the Office denied appellant’s request for reconsideration on the grounds that the evidence submitted was repetitious and thus insufficient to warrant medical review of its July 20, 2000 decision.

The Board finds that appellant has not established that she sustained a respiratory condition causally related to factors of her federal employment.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his/her claim, including that fact that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury.<sup>3</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.<sup>4</sup> The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant,<sup>5</sup> must be one of reasonable medical certainty<sup>6</sup> and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>7</sup> The mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the condition became apparent during a period of employment, nor the belief of appellant that the condition was caused or aggravated by employment conditions is sufficient to establish causal relation.<sup>8</sup>

In support of her claim, appellant submitted a report dated June 22, 1995 from Dr. Khani, an osteopath and her attending physician, who diagnosed chronic bronchitis and asthmatic bronchitis, which he attributed to exposure to pollutants and chemicals during the course of employment. Dr. Khani, however, did not provide any rationale for his opinion or identify the specific pollutants or chemicals to which he attributed appellant's condition. Thus, his opinion is of little probative value.<sup>9</sup>

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>4</sup> *Jerry D. Osterman*, 46 ECAB 500 (1995); *see also Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>5</sup> *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

<sup>6</sup> *See Morris Scanlon*, 11 ECAB 384-85 (1960).

<sup>7</sup> *See William E. Enright*, 31 ECAB 426, 430 (1980).

<sup>8</sup> *Manuel Garcia*, 37 ECAB 767, 773 (1986); *Juanita C. Rogers*, 34 ECAB 544, 546 (1983).

<sup>9</sup> *See Michael E. Smith*, 50 ECAB 313, 316 (1999) (finding that appellant failed to submit a rationalized medical opinion on causal relationship).

Appellant further submitted a form report dated December 21, 1995 from Dr. Khani, in which he diagnosed acute bronchitis, asthmatic bronchitis and an acute bronchial infection and checked “yes” that the condition was due to her employment. Dr. Khani opined that appellant was exposed to internal pollutants and chemicals during repair work. However, Dr. Khani’s opinion that appellant was exposed to pollutants and chemicals at work has no adequate factual basis in light of appellant’s failure to show poor air quality at her workstation during the period in question.<sup>10</sup>

In a report dated December 1, 1999, Dr. Khani recommended disability retirement for appellant. He stated that appellant’s work for the employing establishment since 1975 had exacerbated her acute bronchitis and asthmatic bronchitis. Dr. Khani found appellant disabled from employment subsequent to her “exposure to work performed within her work location, by outside contractors to the air condition system in March 1995.” He noted that he could not identify the specific chemical or pollutant to which appellant was exposed but opined that such pollutants were “known” to exist in the employing establishment’s environment. Dr. Khani, however, did not provide adequate rationale explaining the medical process through which appellant’s work environment would have been competent to aggravate the diagnosed conditions of bronchitis and asthmatic bronchitis. Further, he did not adequately discuss the nature of appellant’s exposure to harmful substances in the workplace, particularly in view of her failure to establish exposure to poor air quality at work. The mere fact that a condition manifests itself or worsens during a period of employment does not raise an inference of causal relationship.<sup>11</sup> Causal relationship must be established by rationalized medical evidence based on a specific and accurate history of the employment incidents or exposures alleged to have caused the disabling condition.<sup>12</sup> As Dr. Khani did not provide a specific factual history or explain the medical process through which appellant became totally disabled due to exposure to chemicals or pollutants during the 1995 air conditioning repair work, his opinion is of diminished probative value and insufficient to establish her claim.

Moreover, the record contains evidence that appellant’s condition was not caused or aggravated by her employment. In a report dated May 10, 2000, Dr. Giaimo, an osteopath who performed a second opinion evaluation, noted that air quality tests from the employing establishment did not reveal “significant allergens or pollutants” and also noted that appellant complained of a long history of respiratory problems. He stated: “Upon review of the records it appears [that [appellant] has had a long[-]standing history of chronic bronchitis and sinopulmonary syndrome. Any exacerbations of this [kind] do not seem related to her work space.” Dr. Giaimo recommended pulmonary function tests to further determine the cause and extent of appellant’s respiratory condition. In a supplemental report dated June 21, 2000, Dr. Giaimo noted that pulmonary function tests and blood gas studies performed on June 9, 2000 showed “no demonstrable pulmonary dysfunction....”

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<sup>10</sup> See *Earl David Seal*, 49 ECAB 152, 155 (1997) (finding that medical opinions based on an inaccurate history provided by appellant are insufficient to establish causal relationship).

<sup>11</sup> *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

<sup>12</sup> *Linda S. Jackson*, 49 ECAB 486, 488 (1998).

Appellant, therefore, has not submitted sufficient evidence to establish that she sustained an employment-related respiratory condition.

The Board further finds that the Office, in its February 27 and January 24, 2001 decisions, properly denied appellant's requests for reconsideration under 5 U.S.C. § 8128.

Section 10.606 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.<sup>13</sup> Section 10.608 provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>14</sup>

In support of her January 9, 2001 request for reconsideration, appellant submitted responses to a questionnaire from her coworkers regarding the air conditioning work performed in March 1995. She further submitted a 1975 report regarding findings of asbestos in her work location and argued that she was exposed to "toxic levels of airborne asbestos" in the 1970's. However, as the current issue is medical in nature, it must be resolved by the submission of relevant medical evidence.<sup>15</sup> Further, the submission of the 1975 report regarding asbestos at appellant's worksite is not relevant to the issue of whether she was exposed to chemicals or pollutants as a result of air conditioning work performed in mid-March 1995. The Board has held that the submission of evidence, which does not address the particular issue involved, does not constitute a basis for reopening a case.<sup>16</sup>

In support of her February 5, 2001 request for reconsideration, appellant resubmitted a June 22, 1995 report from Dr. Khani. However, material which duplicates that already contained in the case record does not constitute a basis for reopening appellant's case for merit review.

As abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.<sup>17</sup> Appellant has made no such showing here and thus the Board finds that the Office properly denied her application for reconsideration of her claim.

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<sup>13</sup> 20 C.F.R. § 10.606(b)(2).

<sup>14</sup> 20 C.F.R. § 10.608(b).

<sup>15</sup> Lay persons are not competent to render a medical opinion; *see James A. Long*, 40 ECAB 538 (1989).

<sup>16</sup> *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>17</sup> *Rebel L. Cantrell*, 44 ECAB 660 (1993).

The decisions of the Office of Workers' Compensation Programs dated February 27 and January 24, 2001 and July 20, 2000 are affirmed.

Dated, Washington, DC  
March 25, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member