

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERI DEGEERE and DEPARTMENT OF THE NAVY,
HUMAN RESOURCES OFFICE, Norfolk, VA

*Docket No. 02-100; Submitted on the Record;
Issued March 10, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to rescind its acceptance of appellant's claim.

On April 19, 2000 appellant, then a 53-year-old education technician, filed an occupational disease claim alleging that she developed swelling, burning and blurriness of her skin and eyes and could not breathe due to exposure to dust and removal of asbestos related to a renovation during her federal employment. On the reverse side of the claim form, her supervisor noted that appellant stopped work on April 10, 2000 and returned on April 11, 2000. He noted that appellant's work location was changed to the library.¹

Appellant submitted a statement, photographs, a job description and treatment notes from a clinic dating from February 16, 1999 to March 25, 2000 and emergency room records.

Medical records were provided by appellant's treating physicians Dr. Regina Tan-Camacho, Board-certified in internal medicine and Dr. Kenneth L. Mayes, a Board-certified otolaryngologist.

In an April 10, 2000 attending physician's report, Dr. Tan-Camacho diagnosed severe allergic reaction to dust. She checked a box "yes" that inquired as to whether or not she believed the condition was caused or aggravated by an employment activity. In the remarks box, Dr. Tan-Camacho added "avoid being in building SC-1 until full evaluation by Dr. Mayes." She stated that appellant could return to work on April 13, 2000 but not to building SC-1.

On April 28, 2000 the employing establishment provided results of air sampling for building SC-1. The employing establishment stated that the sample showed that the results were well below applicable NAVOSH exposure limits for total dust. The employing establishment

¹ The record reflects that appellant's work location was changed to the library as of April 13, 2000 and appellant stopped work on October 9, 2000.

requested that, in the absence of an identifiable workplace hazard, appellant submit medical documentation to demonstrate that her condition was work related.

In a May 15, 2000 report, Dr. Mayes advised that appellant should not enter building SC-1 as she did in fact have a “severe allergic reaction on March 10, 2000 which was certainly attributed to construction progress within building SC-1.”

In a May 16, 2000 report, Dr. Mayes again stated that appellant had some rather remarkable allergic reactions apparently due to some construction that involved destruction of the old number one building at the Staff College. He further advised that he was to begin a process of testing for allergens.

In a June 7, 2000 report, Dr. Tan-Camacho, stated that she had treated appellant as her primary care physician. She noted that on April 10, 2000 appellant presented with allergic reaction to her skin as well as shortness of breath because of the dust in building SC-1. Dr. Tan-Camacho noted that appellant originally had symptoms on March 10, 2000 and was seen at a clinic² and the emergency room. She noted that each time appellant went back to work after the prednisone taper, she seemed to have a relapse. Dr. Tan-Camacho advised that appellant was improving by being in a different building but stated that she did have one more exacerbation on May 25, 2000 with a visit to her office. She stated that appellant should be out of building SC-1 until the renovation was completed.

In a July 24, 2000 report, Dr. Mayes advised that appellant was seen to go over the results of her allergy testing. He stated that her ALCAT testing was limited to some chemicals that showed positive to orris root, which is a chemical of make up and all of the others tested were in the level of acceptable for exposure. On appellant’s allergy testing, Dr. Mayes stated: “she was positive to lambs quarter, English plantain, cockroach mix, and cat pelt which is not exposed to.” He also stated that she was positive to each of two dust mites at levels of +2 to D., farinae and +3 to D. pteronyssinus. Dr. Mayes advised that her chart showed that many of her mold reactions were delayed reactions causing changes in the endpoints and she was positive to a number of molds. He further advised that, “this would indicate to us that, in fact, she should not return to work in the building that she was working in when they started the massive renovations because they are still doing the renovations in the building. This would be building SC-1.” Dr. Mayes also stated that there was a lot of dust and things flying around that would include molds and recommended that she stay in SC-4 until the remodeling was completed.

By letter dated August 8, 2000, the Office advised appellant that her claim had been accepted for allergic reaction to dust from building SC-1 construction.

In an August 31, 2000 report, Dr. Mayes advised that appellant was receiving weekly immunotherapy injections in the allergy clinic and was still in the process of building up the maintenance level on her injections. He stated that appellant indicated that the dust had recently increased and that her skin began to break down on her arms. Dr. Mayes stated that it was his opinion that appellant should continue to avoid exposure to building SC-1 and allow sufficient time for her immunotherapy to build up.

² The record reflects that Dr. Tan-Camacho was on maternity leave.

In an October 10, 2000 report, Dr. Tan-Camacho again stated that appellant had a recurrent allergic reaction due to the construction in progress and checked the box “yes” that appellant’s condition was caused or aggravated by her employment. She stated that appellant was totally disabled from October 2 to the 19, 2000.

In an October 12, 2000 report, Dr. Mayes stated that appellant had inhalant allergies due to dust mold and pollen and allergic reaction including urticaria and shortness of breath. He checked the box “yes” that appellant’s condition was caused or aggravated by her employment and stated that appellant was totally disabled. Dr. Mayes further advised that appellant was not to return to the building as there was no way to determine the severity of her reaction. He further stated that appellant’s symptoms subsided until she reentered the building and the last time she entered the building her reaction was so severe that she had to be treated at the emergency room. On October 23, 2000 Dr. Mayes advised that appellant was not to return to work until final diagnosis of her case.

By letter dated October 30, 2000, the Office requested that Dr. Mayes provide a current rehabilitative treatment plan and an opinion regarding whether appellant’s condition was permanent.

On October 31, 2000 the employing establishment provided a memorandum with regard to the results of air sampling and noted that they were well below the applicable NAVOSH exposure limits for total dust.

In a November 10, 2000 report, Dr. Mayes stated that, at the present time, he did not know what the offending allergen was that was causing appellant so much concern. He noted that all of the things that were tested thus far had proven negative as to the cause of the reactions she has had. Dr. Mayes indicated that he suspected asbestos, but explained that there was no known allergy test to prove this. He stated that asbestos was found in some of the products from the building that was being renovated. Dr. Mayes stated that they were not able to prove any other offending allergen to date. He stated further that the current rehabilitative plan was to continue with her allergy treatment and have her avoid the area as much as possible.

On November 14, 2000 the employing establishment provided additional documentation and suggested that the cause of appellant’s illness may be something other than the work environment.

By letters dated November 14, 2000, the Office requested additional information from appellant’s physicians.³

By letter dated November 17, 2000, appellant responded to the Office’s request for additional information and provided medical records pertaining to her reaction to the antibody HTLV-1/2 and specifying that she had tested positive for the reaction to the antibody but not the disease. She also described her medications, which were prescribed by her physician and advised that she had not had a severe reaction since leaving her place of employment.

³ By letter of that same date, the Office advised appellant that she would soon be scheduled for a second opinion examination, which was cancelled for an unexplained reason and never rescheduled.

In a November 28, 2000 report, Dr. Mayes advised that he did not feel that appellant was totally disabled but certainly could not work in the environment where she was working at the employing establishment. He noted that each time she returned she had marked reactions. He stated that the things that she was allergic to were not able to be identified, although he suspected asbestos and there was no test to confirm it. Dr. Mayes stated that they had tested everything that they had reason to suspect and did not have any further tests to offer. He opined that he did not believe that she was disabled for any condition not related to her employment for which he was aware. Dr. Mayes stated that appellant had not had these reactions anywhere else or under any other circumstances. He responded to the question of appellant's allergic reaction to dust and explained that, once you get an allergy, you do not have to have the normal limits of exposure to have a response. Dr. Mayes stated that appellant's condition resolved to a marked degree when she was removed from the construction area. He stated that her last reaction that he was aware of was a marked reaction with extensive blistering and bullae formation on her skin as well as respiratory problems. Dr. Mayes noted that he was not aware of any treatment including "experimental" medications. He also indicated that the allergic reactions appellant continued to have now were inhalant-type allergies to which many people are afflicted and he did not believe that these were necessarily related to the reaction she was having with respect to building SC-1. Dr. Mayes further opined that he did not believe that anyone attributed her other inhalant allergens to her work environment.

By letter dated December 29, 2000, the Office proposed to terminate appellant's compensation based on new medical evidence from her physician indicating that she was not totally disabled from work and that he could not identify any specific items to which she was allergic.

Appellant responded by letter dated January 21, 2000 and stated that her condition had not continued since she had been out of the connected buildings, she had not had continued reactions and her condition only subsided when she was not in the building.

In a January 10, 2001 report, Dr. Tan-Camacho stated that Dr. Mayes was seeing appellant and that she was writing in support of her patient.

By decision dated January 29, 2001, the Office finalized the proposed termination of compensation benefits and rescission of the acceptance of appellant's claim.

On February 7, 2001 the Office received a January 9, 2001 report from Dr. Mayes, who stated that he had identified specific inhalant allergens, for which appellant was being treated. He explained that what he was not able to identify was the specific antigenic substance that precipitated her marked responses, that began in October 2000. Dr. Mayes provided copies of photographs of the building showing direct connections by an overland passageway two stories in height and noted that there was air circulating common to both buildings. He reiterated that they had not found a specific antigen that precipitated her initial reaction and explained that this only meant that, whatever the antigen was, it had not responded thus far to the testing. Dr. Mayes also again pointed out asbestos and stated that there was no test for asbestos. He explained that appellant's skin changes had almost resolved although there was scarring and demarcations on her forearms, however, the flagrant changes at the time of her initial reaction were beginning to resolve. Dr. Mayes opined that it was his feeling that this was still a reaction

to something that was in the area of the buildings in question, especially the building where she was initially employed.

By letter dated February 12, 2001, appellant's representative requested a hearing, which was held on July 17, 2001.

In an April 22, 2001 report, Dr. Tan-Camacho indicated that she had treated appellant for some time and appellant had had a difficult time with allergic reactions since March 2000. She opined that this started when construction began in building SC-1 at the employing establishment where she worked. Dr. Tan-Camacho opined that it was thought that the allergic reactions were caused by the same air conduction system that connected the two buildings. She also indicated that appellant became depressed and frustrated by her work situation and was treated with antidepressant and anti-anxiety medication. Dr. Tan-Camacho noted that appellant was seeing a psychiatrist and receiving counseling.

By letter dated May 21, 2001, appellant's representative enclosed medical records from Dr. Patrick D. Thrasher, a Board-certified psychiatrist and neurologist. She included copies of Dr. Thrasher's progress notes regarding appellant's anxiety and depression and fear of allergic reactions in the workplace. Appellant requested that her claim be amended to include anxiety and depression.

By memorandum dated August 6, 2001, the employing establishment made comments concerning the transcript of hearing. The Chief of the Educational Assessment Division stated that, during the time period between March and October 2000, appellant worked over 90 percent of the time and used a total of 78.5 hours of sick leave. He further stated that appellant's position had not been filled. Additionally, the chief noted that the construction project to renovate the old library was complete, the area around her old window was cleared and the new library had a separate air handling system from the SC-1 system. He stated that any exchange of air would be minuscule upon opening and closing of the doors at both ends of the walkover. The chief added that the new library did not have a basement and in fact, appellant's office was on the first floor. He stated that the crossover on the second floor did not become operational until October 2000; however, the crossover on the third floor was operational in 1998. Additionally, it was noted that other individuals might have had reactions during the remodeling, however, once removed from the area, the reaction ended.

By response dated August 20, 2001, appellant's representative noted appellant's employment was being terminated. She also noted that appellant used all of her Family Medical Leave Act of 12 weeks; 240 hours of annual leave, 4.4 hours of compensatory time and a time off award of 16 hours. Appellant stated that she only stopped working when her doctor told her the next reaction could be fatal. The representative stated that the buildings were attached and considered one, and stated that they were on one air duct system. She stated that the room appellant occupied was the last one by the exit door and nearest to the oldest books stored in the library (plagued with dust and mold and no ventilation). The representative also explained that the only access appellant had to pick up work from the other employees was on the third floor walkover and she had to somehow pass through the second floor walkover, which was not permanently sealed off.

By decision dated September 17, 2001, the Office hearing representative affirmed the January 29, 2001 Office decision. The hearing representative further advised that the claim for a consequential psychiatric condition need not be addressed and advised appellant to submit a notice of occupational disease if she wished to pursue a claim due to other employment factors.

The Board finds that the Office did not meet its burden of proof to rescind its acceptance of appellant's claim.

Once the Office accepts a claim and pays compensation benefits, it has the burden of justifying the termination or modification of compensation. This holds true where the Office later decides that it erroneously accepted a claim. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous. Section 10.610⁴ of the implementing regulations of the Office states:

“The Federal Employees’ Compensation Act specifies that an award for or against payment of compensation may be reviewed at any time on the Director’s own motion. Such review may be made without regard to whether there is new evidence or information. If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time and on the basis of existing evidence) may modify, rescind, decrease or increase compensation previously awarded, or award compensation previously denied. A review on the Director’s own motion is not subject to a request or petition and none shall be entertained.

In the present case, the Office accepted that appellant sustained an allergic reaction to dust from building SC-1 construction due to exposure to dust in the course of her federal employment. The Office based its rescission of appellant’s claim on the July 24, 2000 report of Dr. Mayes, a Board-certified otolaryngologist, who advised that appellant’s allergy testing revealed that she was positive to lambs quarter, English plantain, cockroach mix and cat pelt to which she was not exposed. Additionally he advised that she was positive to each of two dust mites at levels of +2 to D., farinae and +3 to D. pteronyssinus. Furthermore, Dr. Mayes advised that she was positive to molds and the doctor opined that there was a lot of dust and things that included mold in the building.

The Office rescinded appellant’s claim based on the November 10 and 28, 2000 reports of Dr. Mayes. In his November 10, 2000 report, Dr. Mayes advised that, at the present time, he did not know what the offending allergen was that was causing appellant so much concern. He stated that all things tested thus far had proven negative as to the cause of the reactions she has had and suspected asbestos but that was no test. For that, Dr. Mayes explained that they were not able to prove any offending allergen to date and he recommended a continued allergy treatment and avoidance of the area as much as possible. In his November 28, 2000 report, he explained that he did not feel that appellant was totally disabled, but she could not work in the environment where she was working at the employing establishment. Dr. Mayes stated that appellant had marked reactions each time she returned. He stated he was not able to identify the

⁴ 20 C.F.R. § 10.610.

things she was allergic to but they had tested everything they had reason to suspect and had no further tests to offer. Dr. Mayes indicated that he did not believe that appellant was disabled for any condition not related to her employment as she had not had these reactions anywhere else or under any other circumstances. He further explained appellant's reaction to dust by stating that once you have an allergic reaction, you do not have to have the normal limits of exposure. Dr. Mayes explained that appellant's condition resolved to a marked degree when she was not in the construction area. Further, he explained that the reactions appellant was currently having were not necessarily related to those with respect to building SC-1. However, in all of these reports, Dr. Mayes opined that appellant had a reaction to something in building SC-1. He did not opine that appellant's reaction was not related to her employment, although he later added that her current allergies were not related, as she had not been to the place of employment for some time.

The Board finds that there is not sufficient evidence to rescind acceptance of appellant's claim for allergic reaction to dust from building SC-1. Dr. Mayes, appellant's physician, continued to state that appellant could not return to the area due to a reaction to dust in the area and although he could not find the specific problem, he continued to state that dust from the building was causing her problems and appellant was to avoid the area as much as possible. Furthermore, in his January 9, 2001 report, Dr. Mayes tried to explain to the Office that in essence they had identified specific inhalant antigens for which appellant was being treated, however, they had not identified the specific antigenic substance that precipitated her marked responses and further explained that this only meant that whatever the antigen was, it had not responded thus far to testing. He stated it was his feeling that this was still a reaction to something that was in the area of the buildings in question, especially the building where she was initially employed. The evidence reflects that appellant experienced an allergic reaction as a result of the construction process and the Office has not shown that this did not occur. The medical reports supplied by appellant's physicians, continue to support that the reaction occurred due to dust and remodeling at the employing establishment. There is no contradictory evidence of record at the time of the Office's decision to dispute the cause of the reaction or that appellant's sustained a reaction.⁵ Consequently, as the Office has provided insufficient evidence to justify its rescission of acceptance of appellant's claim for allergic reaction to dust from building SC-1 construction due to exposure to dust in the course of her federal employment, the Board finds that the Office did not meet its burden of proof in rescinding its acceptance of appellant's claim.

⁵ The issue regarding termination is moot, since the finding on rescission is reversed.

The September 17 and January 29, 2001 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC
March 10, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member