

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY BOWDEN and DEPARTMENT OF THE NAVY,
NAVY CONSTRUCTION BATTALION CENTER, Point Mugu, CA

*Docket No. 03-1407; Submitted on the Record;
Issued September 30, 2003*

DECISION and ORDER

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

The issue is whether appellant's aggravation of preexisting asthma and hyperactive airways disease ceased after she was reassigned to the position of inspector.

On March 7, 2000 appellant, then a 58-year-old electronic technician, filed an occupational disease claim alleging that, beginning August 26, 1996, she was exposed to solder and dust which caused occupational asthma while in the performance of her federal duties. Appellant had intermittent periods of disability but did not stop working.

Appellant submitted medical reports for treatment of shortness of breath, wheezing and sinus infections since 1996, which required hospitalization in 1999. Dr. George Yu, a Board-certified physician in pulmonary disease, treated appellant for status asthmaticus, which he indicated in an August 4, 1999 report was probably perpetuated by bilateral sinusitis. He noted that during the course of treatment appellant was concerned about the possibility of occupational asthma because of her soldering duties at the employing establishment. Dr. Yu noted that there were exposures to various fumes including lead during her work.

Appellant submitted a job description and personnel information, which indicated that as an electronic technician she assembled various electrical components requiring soldering since 1980. In a May 23, 2000 statement, Thomas Pelosi, appellant's supervisor, noted that appellant was hospitalized in June 1999 with acute asthma and that over the last four years she had been sick with sinusitis or asthma.

By decision dated October 24, 2000, the Office of Workers' Compensation Programs denied the claim on the grounds that the evidence submitted only indicated a possibility of occupational asthma as she performed the duties of a solderer at the employing establishment. The Office further found at that time that the evidence did not indicate what appellant was exposed to and did not contain a medical opinion on how much exposure contributed to her condition.

On November 20, 2000 appellant through counsel requested an oral hearing on the decision denying compensation. At the May 23, 2001 hearing, appellant testified regarding her work duties and exposure to solder until 2000 when her physicians determined that she should be removed from soldering duties.

On June 31, 2001 an Office hearing representative vacated the October 24, 2000 decision and remanded the case for further development.

On August 22, 2001 the Office received an investigative report from the employing establishment dated July 20, 2001, which evaluated the hazardous materials present in appellant's work environment while she served as an electronic technician. The report indicated that, from 1987 to the present, soldering was performed daily, using solder which contained lead, tin and rosin acid on small electrical components for two to four hours per day. The report recommended that exposure to the type of solder used in appellant's work environment be controlled to levels as low as possible. The report indicated that a brown tint on the ceiling light fixtures suggested that smoke from solder flux or other solder components were present in the room air over an extended time period; however, the light fixtures were cleaned at the same time that new light fixtures were installed in 1997 and remained clean since that time. The report concluded that there was no evidence to show that any of the hazardous materials used by appellant exceeded airborne occupational exposure limits.

The Office referred appellant to Dr. Ronald Popper, Board-certified in pulmonary disease, for a second opinion medical examination.

In a report dated October 16, 2001, Dr. Popper stated he examined appellant that day and reviewed a statement of accepted facts and medical records in conducting his evaluation. Dr. Popper noted that appellant claimed to have developed asthma as a result of solder flux/fumes and dust in 1996; however, prior to 1996 she was first diagnosed with asthma by her family physician when she suffered from sinus infections and bronchitis. Appellant was hospitalized in June 1999 and May 2000 with exacerbations of asthma following a fall which caused a rib fracture and pulmonary contusion. Dr. Popper stated that appellant complained that ever since 1996 she has had progressively severe asthma with daily symptoms of cough, chest tightness, wheezing and shortness of breath and that her asthma worsened when she was at work and exposed to soldering fumes and a dusty environment. He related that appellant's occupational duties were changed in an effort to remove her from an enclosed environment or exposure to fumes or dust; however, appellant contended that her asthma symptoms persisted, including chronic sinus congestion and post nasal drip.

Dr. Popper reviewed his physical examination of appellant and outlined the diagnostic tests performed. He diagnosed: asthma, 10 pack plus cigarette consumption, allergic rhinitis, chronic sinusitis, possible bilateral otitis media, gastroesophageal reflux disease, overweight, snoring/upper airway obstruction/excessive daytime sleepiness, hypertension, hyperlipidemia

and heart murmur. Dr. Popper indicated that he diagnosed appellant with asthma based on multiple environmental exacerbating factors, family and prior medical history, and relief of symptoms with certain medication. He stated:

“While soldering fumes are a well-known cause of occupational asthma, this patient had been exposed to soldering fumes and dust in the same work environment for over three decades prior to the onset of her symptoms. Furthermore, records provided indicate that serial peak flows were obtained by Dr. Yu and failed to show a decline when the patient was in her work environment, even after receiving a diagnosis of asthma. An environmental report ... reveals that there is no evidence of hazardous materials that she used exceeding airborne occupational exposure limits. Additionally, the patient has been working primarily as an inspector for the past year with persistent and or progressive symptoms of asthma when she has no longer been exposed to the possibly offending agent. Finally, the patient has had a clear episode of sinusitis which seems to have been the precipitating factor leading to her diagnosis of asthma in 1996. Therefore, while solder fumes are a potential cause of occupational asthma in this individual, it seems unlikely to be a direct cause or precipitating event. It is likely that, at worst, this has been an aggravating factor superimposed upon preexisting asthma or hyperactive airways disease which followed upper respiratory tract illnesses including a sinus infection.”

* * *

“[T]his patient’s asthma may have been temporarily aggravated by exposure to soldering fumes and dust in her work environment. She has since changed her position to that of inspector within the past year and is no longer exposed on a persisting basis to the soldering fumes or dust which she claims have caused or aggravated her condition. The aggravation would therefore have been temporary and should have ceased at the time of the change of her occupational status to that of an inspector.”

By decision dated October 25, 2001, the Office accepted that appellant sustained a temporary aggravation of her preexisting asthma condition as a result of her exposure to soldering fumes during her federal employment which ceased when she changed occupations to inspector.

On December 17, 2001 appellant submitted a Form CA-7 claim for compensation for disability for the period December 29, 2001 through January 26, 2002 as a result of the August 26, 1996 employment injury.

By decision dated March 29, 2002, the Office denied appellant’s December 17, 2001 claim for disability compensation. The Office found that appellant no longer had any aggravation of her preexisting asthma and hyperactive airways disease.

In a letter dated June 2, 2002, appellant requested reconsideration and challenged Dr. Popper’s finding that she had preexisting asthma and hyperactive airway disease that was

temporary and had ceased when her job changed to the position of inspector. Appellant argued that she was still being treated for asthma and that, since taking the inspector position, she had not been moved from her work area. Appellant submitted a personnel form related to an application for disability retirement under the Civil Service Retirement System (CSRS) dated December 5, 2001, which noted by a personnel specialist that an accommodation could not be made for appellant by the employing establishment due to the severity of the medical condition and the requirements of the position. Appellant also submitted a supervisor's statement from Mr. Pelosi which indicated that when appellant informed the employing establishment that she had been diagnosed with asthma she was no longer required to perform any soldering but still be able to perform all other duties as an electronics technician.

In a letter dated December 5, 2002, the Office advised the employing establishment of appellant's contention that she continued to be exposed to soldering fumes and dust because she never changed workstations after the reassignment of duties. The Office requested information pertaining to appellant's reassignment and whether she continued to be exposed to soldering fumes and dust. In a letter dated February 12, 2003, Mr. Pelosi indicated that appellant worked as an electronic technician until November 21, 2000, when she was designated as the primary inspector for the work center.¹ Mr. Pelosi stated that, as the primary inspector, appellant was located in the same work space as before but would no longer be required to perform any soldering duties. She sat at a desk about 20 feet from the solder workstations and when one of the technicians would finish soldering they would call appellant over to the station to inspect their work. Mr. Pelosi indicated that, as for dust in the work center, daily clean-ups and weekly field days were performed.

By decision dated February 18, 2003, the Office denied modification of the March 29, 2002 decision.

Under the Federal Employees' Compensation Act,² 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.³ However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.⁴ Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁵ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ After termination or modification of compensation benefits, clearly warranted on the basis of the

¹ The record reflects that appellant's physician recommended that appellant avoid exposure to soldering fumes and dust at her workplace on March 14, 2001 and that a commander with the employing establishment agreed and determined on May 15, 2001 that appellant be permanently placed into an inspector position to minimize further exposure to respiratory hazards such as workplace dust and solder.

² 5 U.S.C. §§ 8101-8193.

³ *Richard T. DeVito*, 39 ECAB 668, 673 (1988); *Leroy R. Rupp*, 34 ECAB 427, 430 (1982).

⁴ *Ann E. Kernander*, 37 ECAB 305, 310 (1986); *James L. Hearn*, 29 ECAB 278, 287 (1978).

⁵ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁶ *Id.*

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.⁷

The Board finds that the Office properly terminated appellant's compensation on October 25, 2001 in that the weight of the medical evidence at the time of such termination was represented by the thorough, well-rationalized second opinion of Dr. Popper in his report dated October 16, 2001. The opinion of Dr. Popper established that appellant did not have a continuing condition or disability due to her August 26, 1996 employment injury based on the evidence of record at that time. He clearly outlined that appellant's exposure to soldering fumes and dust while working as an electronic technician was a temporary aggravating factor superimposed upon preexisting asthma or hyperactive airways disease, however, that appellant's occupational duties were changed in an effort to remove her from an enclosed environment or exposure to fumes or dust and that her condition ceased when she was reassigned to the position of inspector. Dr. Popper further explained that although appellant contended that her asthma symptoms persisted including chronic sinus congestion and post nasal drip despite this job change, she was no longer exposed on a persisting basis to the soldering fumes or dust, therefore, the aggravation was temporary and should have ceased at the time of the change of her occupational status to inspector. Dr. Popper's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts and provided a thorough factual and medical history.⁸

Given that the Board has found that the Office properly relied on the October 16, 2001 report of Dr. Popper in terminating appellant's compensation on October 25, 2001, the burden shifts to appellant to establish that she is entitled to compensation after October 25, 2001. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability that continued after termination of compensation benefits.⁹

Appellant in her June 2, 2002 request for reconsideration of the October 25, 2001 decision alleged that she continued to be exposed to soldering fumes and dust following reassignment to the inspector position and continued to be treated for asthma. Appellant reported that she was never removed from the work space where she developed her condition and that, because she was tired of taking breathing treatments at work and of always being sick, she retired from her position on December 29, 2001. Appellant submitted a supervisor's statement which indeed indicates that at the time of her retirement she served as the primary inspector in the same work space where soldering duties were performed beginning November 2000, when the employing establishment learned of her condition. Mr. Pelosi, appellant's former supervisor, indicated that appellant sat at a desk 20 feet away from the solder

⁷ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁸ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957). Appellant alleged that Dr. Edwards was not apprised of the duties of his light-duty positions with the employing establishment, but the statement of accepted facts and other documents provided to Dr. Edwards contained descriptions of these duties.

⁹ *Talmadge Miller*, 47 ECAB 673, 679 (1996); see also *George Servetas*, 43 ECAB 424 (1992).

workstations and that appellant was called into those workstations whenever any of the electronic technicians, the position she formerly held, completed their soldering duties for her inspection of their work. The supervisor noted though that the area was cleaned daily for dust.

Given the additional evidence submitted by appellant regarding her proximity to the original work space which the Office accepted had temporarily aggravated her preexisting condition and the duties outlined by her supervisor which indicate that appellant had some contact with solder and dust in her inspector position, the case shall be remanded to the Office for further development.

On remand, the Office should request exposure information from the employing establishment regarding the work space involved in performing the duties of inspector which appellant held from October 25, 2001 the date of termination to her retirement on December 29, 2001. The Office should then prepare a statement of accepted facts and refer it, together with appellant and the case record, to Dr. Popper for a supplemental report or a Board-certified specialist in the appropriate field of medicine, to determine whether appellant had work-related residuals or continuing disability after.

The decision of the Office of Workers' Compensation Programs dated February 18, 2003 is hereby set aside and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
September 30, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member