

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLINT O. BOWERS and DEPARTMENT OF TREASURY,
BUREAU OF ENGRAVING & PRINTING, Ft. Worth, TX

*Docket No. 03-1436; Submitted on the Record;
Issued January 20, 2004*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant had any continuing disability or residuals after December 1, 2002, the date the Office of Workers' Compensation Programs terminated his wage-loss benefits, causally related to his accepted employment injury.

On December 12, 1999 appellant, then a 38-year-old pressman, filed an occupational disease claim alleging that exposure to chemicals at work beginning May 25, 1995, caused him to suffer chronic sinusitis, anxiety, dizziness, fatigue, memory loss, nausea and allergies. The Office accepted the claim for nausea, dizziness, allergic rhinitis and generalized anxiety attacks causally related to chemical exposure in the workplace. Appellant stopped work on August 26, 1999 and received appropriate disability compensation and medical and rehabilitative benefits.

In a letter dated October 9, 2002, the Office issued appellant a notice of proposed termination of compensation on the grounds that the medical evidence of record failed to support that he continued to suffer from the accepted work-related conditions. The Office further advised that, if he disagreed with the proposed action, he should submit additional evidence relative to the issue within 30 days for consideration and if a response was not received the Office would proceed with the proposed action.

In a letter dated November 6, 2002, the Office advised that, since appellant had been reemployed as a groundskeeper with wages of \$380.88 per week since September 2, 2002, his compensation benefits would be adjusted based on actual earnings.

In a letter also dated November 6, 2002, appellant disagreed with the proposed termination and asserted that he was simply in remission and had not recovered 100 percent from the work-related injury. Appellant asserted that the three physicians of record opined that he continued to be totally disabled from performing his assigned work duties, which, therefore, entitled him to paid compensation.

In a decision dated November 19, 2002, the Office terminated appellant's compensation benefits effective December 1, 2002, on the grounds that the medical evidence established that appellant's injury-related disability had ceased. The Office explained that an employee with an accepted employment-related injury is no longer entitled to further compensation for wage loss once that employee has recovered from the employment injury to the extent that he or she can perform the duties of the position held at the time of the injury or earn equivalent wages. The Office issued appeal rights with the termination decision.

In a letter dated December 18, 2002, appellant through counsel requested reconsideration and submitted additional medical evidence. Appellant's counsel asserted in his reconsideration request that the rate of pay appellant received in his rehabilitative position of groundskeeper was not commensurate with his pay at the employing establishment. He further asserted that appellant should be entitled to the differential in pay as he was not able to return to his prior position working around chemicals.¹

In a merit decision dated April 11, 2003, the Office denied modification of the November 19, 2002 termination decision. The Office found that the reports of appellant's attending physicians and the second opinion examiner contained in the record substantiated that appellant had recovered from his accepted conditions and could return to full duty without chemical exposure despite the medical evidence submitted by appellant in support of continuing disability.

The Board finds that appellant had no continuing disability or residuals after December 1, 2002, causally related to his accepted employment injury.

Under the Federal Employees' Compensation Act,² once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.³ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to employment.⁴ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.⁵ In order to prevail, appellant must establish by the weight of the reliable,

¹ The Board notes that the November 6, 2002 letter regarding a reduction in compensation was merely notification that, due to appellant's reemployment in alternative employment, his compensation would be based on actual earnings and that he remained entitled to medical expenses for the treatment of the accepted conditions. The letter was devoid of findings of fact that appellant's actual earnings did in fact represent his wage-earning capacity and was not accompanied by appeal rights; *see* Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reemployment and Determining Wage-Earning Capacity*, Chapter 2.813.12(a) and (1)(c) (August 1991 and January 1992). As such, this notification does not constitute a formal wage-earning capacity determination by the Office from which an appeal can be filed before the Board; *see also* Chapter 2.813(12a)(1)(c) (January 1992).

² 5 U.S.C. §§ 8101-8193.

³ *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

⁴ *Id.*

⁵ *Virginia Davis-Banks*, 44 ECAB 389 (1993).

probative and substantial evidence that he or she had an employment-related disability, which continued after termination of compensation benefits.⁶

In this case, the Office accepted both physical and psychological conditions causally related to appellant's federal employment, *i.e.*, that appellant suffered physically from nausea, dizziness and allergic rhinitis due to chemical exposure in the work environment and psychologically from generalized anxiety attacks. Prior to the termination of wage-loss benefits by the Office on November 19, 2002, the medical evidence supported that both appellant's physical and psychological conditions had resolved due to treatment and that appellant could return to gainful employment. The medical evidence of record is sufficient to justify termination.

Dr. Peter Polatin, a Board-certified psychiatrist and second opinion examiner, conducted mental health examinations on June 22 and 26, 2000 and found appellant emotionally fit for duty. In his report dated June 26, 2000, Dr. Polatin stated that, although appellant's anxiety and panic attacks were caused by exposure to chemicals in the workplace, he was at the very least in partial if not complete remission with only mild symptoms of anxiety. The physician found that appellant was capable of returning to full duty in a workplace situation without exposure to the chemical fumes, to which he was previously exposed. Dr. Jerry McGill, appellant's attending psychologist, submitted a work restriction evaluation to the Office dated July 3, 2000, which noted that appellant had anxiety secondary to chemical exposure, however, that he could return to a normal eight-hour workday in an environment that did not risk reexposure. The Board finds that the reports of Dr. McGill, appellant's treating psychologist and Dr. Polatin, the second opinion examiner, contain well-rationalized opinions negating any continuing residuals due to the accepted generalized anxiety disorder. The reports support that appellant's anxiety disorder had ceased and that he was capable of full-duty work outside of a chemical environment.

The record contains a neuropsychological report from Dr. Susan Franks, a clinical psychologist, who evaluated appellant in 2000, upon referral from Dr. McGill and discussed appellant's anxiety disorder related to chemical exposure. In the report, Dr. Franks indicated that the purpose of the evaluation was to determine the etiology to appellant's psychological presentation as a result of occupational chemical exposure. She reported that appellant presented with a history of episodic dizziness, headaches, fatigue, burning of the nose and eyes and chest tightness due to work-related chemical exposure, which led to sleep disturbance and anxiety attacks after approximately six months. Dr. Franks indicated that appellant had complaints of decreased stress tolerance, confusion, feeling "zoned out and dazed," with "messed up emotions," decreased memory and concentration and word finding problems at the time of her evaluation. She diagnosed neurocognitive dysfunction and anxiety disorder secondary to neurotoxic chemical exposure by history and probable chronic toxic encephalopathy. The Board finds that the report of Dr. Franks is of diminished probative value to the pertinent issue of the case, whether appellant had any continuing disability on or after December 1, 2002 due to his accepted employment injury as it does not address the issue of disability subsequent to the Office's November 19, 2002 decision terminating appellant's compensation benefits on December 1, 2002. The report is also of limited probative value as Dr. Franks suggests that

⁶ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

appellant may have “chronic toxic encephalopathy” a condition, which has not been established or accepted as employment related. Further, Dr. Franks is a clinical psychologist and appears to be delving into physical matters beyond her competence.

Dr. Larry Burrows, an osteopath and appellant’s attending physician, discussed the physical extent and duration of appellant’s work injury on March 21, 2002 and reported to the Office that appellant’s examination was normal and that the effects of the work injury had totally ceased. Dr. Burrows also found that appellant could return to work in an environment without chemical exposure. In a report dated April 16, 2002, he indicated that appellant had significant allergic responses to chemicals at the employing establishment beginning in 1995, however, that for the last year he had been symptom free. Dr. Burrows reiterated that appellant had no disability or work restrictions other than to avoid those same chemicals, to which he was previously exposed. The reports by Dr. Burrows are reliable medical evidence sufficient to justify termination on the physical components of the claim. His reports support that the allergic conditions accepted in this case are not severe or permanent in nature. Dr. Burrows suggests that nausea and dizziness in particular are extremely transitory in nature, such that appellant would not experience these conditions at all unless exposed to the specified chemicals. He restricted appellant permanently from exposure to such allergens in the workplace for precautionary measures, however, very clearly indicated that appellant was capable of gainful employment. The opinion of Dr. Burrows is sufficiently well rationalized, based upon a proper factual and medical background and supported by objective findings of minimal symptomatology related to the accepted physical conditions, which establish that appellant is fit for duty without chemical exposure.

On reconsideration of the termination decision, appellant through counsel submitted a report dated December 3, 2002 from Dr. Ade Adedokun, an osteopath, who reviewed his physical examination of appellant for the purpose of providing an impairment rating. The physician diagnosed work-related chemical exposure, anxiety and lability of mood and extensive sinus disease and further provided a whole person permanent impairment rating based on an air passage defect. Dr. Adedokun did not sufficiently discuss appellant’s current diagnosis related to the accepted conditions or specifically find that appellant was disabled due to the work-related injury. Dr. Adedokun’s impairment rating is of no relevance to the pertinent issue of whether appellant had any continuing disability after July 18, 2000, due to his accepted employment injury.

Based on the evidence before the Office at the time of the November 19, 2002 decision, the Office met its burden of proof to terminate appellant’s compensation in this case.

The decisions of the Office of Workers' Compensation Programs dated April 11, 2003 and November 19, 2002 are hereby affirmed.

Dated, Washington, DC
January 20, 2004

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member