

FACTUAL HISTORY

On August 22, 1999 appellant, then a 40-year-old mail processor, filed an occupational disease claim alleging that due to excessive dust at her workplace, she experienced dust exposure, sinus pressure and bronchospasm. On August 16, 2000 the Office accepted appellant's claim for a temporary aggravation of asthma. She did not stop work.

Dr. Ronald Jendry, a Board-certified family practitioner, referred appellant to Dr. Robert J. Lapidus, a Board-certified internist. In a report dated June 27, 2000, Dr. Lapidus assessed appellant with cough, shortness of breath and occupational wheezing, which he indicated was apparently precipitated by her work environment which included exposure to a significant amount of dust. He opined that appellant likely had "underlying reactive airways disease, which was aggravated by her work setting."

In a September 21, 2001 note, a physician's assistant noted that appellant developed occupational asthma while working in a very dusty environment, that she had reached maximum medical improvement and that the asthma was likely permanent.

Appellant submitted several claims for intermittent compensation covering the period from September 22, 2001 through February 22, 2002.

By letter dated November 29, 2001, the employing establishment controverted appellant's claims for compensation. The employing establishment noted that appellant's only medical documentation was signed by a nurse practitioner and therefore did not constitute a physician's opinion under the Federal Employees' Compensation Act, that no medical evidence was provided to support any disability from work and that appellant had not performed any duties as a mail processor since December 1999 and that any aggravation of her asthma would have ceased by that date. The employing establishment also noted that appellant worked an average of 34.61 hours a week or 6.92 hours a day prior to the date of the injury and accordingly would not be entitled to compensation for 8 hours of work a day. The employing establishment requested that a decision be issued regarding whether appellant's condition was a temporary or permanent aggravation.

In response to the request of the employing establishment, appellant saw Dr. Robert M. Tate, a Board-certified internist. In a report dated January 22, 2002, Dr. Tate indicated that appellant's history was consistent with the diagnosis of asthma and recurrent episodes of cough and wheeze. He noted that appellant did have symptoms of acute bronchitis. Dr. Tate recommended that she not work at the Highland Ranch facility due to her repeated deteriorations while working there.

On January 23, 2002 appellant was seen by Dr. Gretchen Hinson, a Board-certified emergency physician, who indicated that appellant had signs and symptoms consistent with bronchitis. She noted that appellant had a longstanding history of occupational lung disease. Dr. Hinson opined that appellant's symptoms were consistent with bronchitis and probably acute or chronic at the time of evaluation.

On February 27, 2002 appellant began light-duty work for five hours a day four days a week.

On April 9, 2002 appellant filed claims for intermittent compensation for periods of disability commencing February 23, 2002. Additional claims for compensation for subsequent periods were later filed.

In an attending physician's report dated May 8, 2002, Dr. David Linn, a treating Board-certified family practitioner, indicated that appellant had been a patient of his since 1999 when she developed occupational asthma. He noted that, during the time she had been working for the employing establishment at the Highland Ranch facility from September 2001 to January 2002, her asthma became symptomatic with cough, shortness of breath and wheezing. When he saw appellant on February 28, 2002 she was working at the Columbine facility and had recovered from her exacerbations in December 2001 and January 2002. Dr. Linn increased appellant's work hours from four- to five-hour days to six- to seven-hour days. He noted that when he saw appellant on April 3, 2002 he released her to regular eight-hour work shifts as her asthma was stable and not causing any reported problems. Dr. Linn discussed with her the necessity of avoiding exposure to labeled dusts or chemicals, which could bother her asthma. In a report dated June 7, 2002, Dr. Linn found that appellant had occupational asthma and that he believed the condition was caused or aggravated by her employment because it improved on weekends and got worse with paper dust exposure. He noted that her period of partial disability was July 30, 1999 to June 8, 2002.

In a letter dated January 21, 2003, the employing establishment noted that appellant had not worked since May 17, 2002 and was in nonpay status through January 21, 2003. In a letter to the Office dated April 11, 2003, the employing establishment controverted appellant's claim and noted that she had not worked as a mail processor since December 1999 and accordingly any aggravation of asthma would have ceased by that date.

By decision dated May 8, 2003, the Office denied appellant's claims for compensation on and after February 23, 2002 as there was no medical evidence to support appellant's inability to work as a result of the July 30, 1999 employment injury.

On May 29, 2003 appellant requested an oral hearing before an Office hearing representative.

On June 4, 2003 appellant was referred to Dr. William V. Kinnard, a Board-certified internist, for a second opinion. However, no report from Dr. Kinnard is in the record.

In a March 28, 2003 attending physician's report, Dr. Lewis A. Fraterelli, an osteopath, indicated that he was appellant's new treating physician. He indicated that appellant had occupational asthma and was partially disabled from July 30, 1999. In a June 16, 2003 note, Dr. Fraterelli stated that he reviewed appellant's records and that her condition dated back to July 1999 and "certainly appears to be a work[-]related occupational asthma."

In a November 17, 2003 report, Dr. Randolph W. Pock, a Board-certified psychiatrist, indicated that appellant had symptoms of major depression secondary to the asthma aggravation,

which had been accepted as work related by the Office. He added that appellant was able to return to her previous work duties immediately.

At the hearing held on November 20, 2003, appellant testified that she never was sick before and that all her problems with asthma started as a result of running the machine at work and that her basic symptoms were sinus pressure, runny nose and sneezing. Appellant stated that her hours were increased in 2002 to 28 hours a week and then to 32 hours a week. She indicated that on May 16, 2002 she was sent home because the employing establishment was sending home all light-duty employees. She returned to work on January 22, 2003.

In a December 19, 2003 note, Dr. Linn indicated that by February 27, 2002 appellant was working 28 hours a week, by April 3, 2002 her hours were increased to 32 hours a week and that it was recommended by May 7, 2002, that she should be working a full 40-hour week as long as she could be kept away from reexposure to dust and chemicals.

By decision dated February 17, 2004, the Office hearing representative affirmed the May 8, 2003 Office decision denying appellant's claim for disability for the period beginning February 23, 2002.

LEGAL PRECEDENT

For each period of disability claimed, appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that she is disabled for work as a result of the employment injury.² Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues, which must be proved by a preponderance of the reliable, probative and substantial medical evidence.³ As used in the Act,⁴ the term "disability" means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁵

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.⁶ The Board has stated that when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt too much to work without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁷

² *Fereidoon Kharabi*, 52 ECAB 291 (2001); *David E. Goss*, 32 ECAB 24 (1980).

³ *David H. Goss*, *supra* note 2.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

⁶ *See Dean E. Pierce*, 40 ECAB 1249 (1989).

⁷ *Fereidoon Kharabi*, *supra* note 2.

ANALYSIS

The Board finds that there is insufficient rationalized medical evidence to establish that appellant was totally disabled commencing February 23, 2002. Appellant began working light duty on February 27, 2002. Dr. Linn indicated that when he saw appellant on February 28, 2002 she had recovered from her exacerbations of December 2001 and January 2002 and increased her work hours. On April 3, 2002 he released appellant to work with no restrictions. The employing establishment indicated that it had accommodated appellant's restrictions and that appellant did not work an eight-hour day before the injury. There is no evidence that appellant was not provided work within Dr. Linn's restrictions prior to April 3, 2002. Although appellant argues that she was denied light duty after May 16, 2002, thereby establishing her disability from work, this argument is not persuasive as Dr. Linn indicated that appellant could return to work without restrictions on April 3, 2002. Although Dr. Linn also reported on April 3, 2002 that appellant should avoid exposure to dust or chemicals that could impact her asthma, the Board notes that fear of a future injury is not compensable.⁸ Moreover, his opinion that appellant's condition "appears to be work related" is speculative and thus not a basis for establishing causal relationship.⁹ Dr. Linn's June 7, 2002 report, which stated that appellant's employment caused or aggravated her condition and improved on weekends, lacks rationale to support specific periods of disability. The physician did not address her working conditions and did not describe any periods of total disability due to any exacerbation of her asthma condition. Dr. Fraterelli indicated that appellant was partially disabled due to occupational asthma since July 30, 1999. However, he did not see appellant until March 28, 2003, so his opinion is based on appellant's statements and not on his own observations.¹⁰ Therefore, the medical evidence is not sufficient to establish that appellant was disabled on or after February 23, 2002.

⁸ *Carlos A. Marrero*, 50 ECAB 117 (1998).

⁹ *See Ellen L. Noble*, 55 ECAB ____ (Docket No. 03-1157, issued May 7, 2004).

¹⁰ *See John L. Clark*, 32 ECAB 1618 (1981).

CONCLUSION

Appellant has not established that she was disabled on or after February 23, 2002.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 17, 2004 is affirmed.

Issued: May 18, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member