United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 06-759**
	)	**Issued: August 17, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, Employer	)	

Appearances:
John P. Works, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 13, 2006 appellant, through counsel, filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated June 15, 2005, which terminated her compensation benefits, and November 28, 2005, denying modification of the termination decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's medical and compensation benefits effective June 16, 2005; and (2) whether appellant established that she had any continuing employment residuals or disability after June 16, 2005.

FACTUAL HISTORY

On May 7, 2003 appellant, a 48-year-old rural carrier, filed a traumatic injury claim alleging that on April 30, 2003 she had a severe asthma attack due to paint fumes at the employing establishment. She stopped work on April 30, 2003, returned to work four hours per day on October 15, 2003 and stopped on October 18, 2003. On November 8, 2003 appellant

returned to work part time, stopped again on November 14, 2003 and has not returned. The Office accepted the claim for asthma attack and placed her on the periodic rolls from temporary compensation effective September 18, 2004.

In a December 16, 2003 attending physician's report (Form CA-20), Dr. F. Beth Hughes, a treating Board-certified internist, diagnosed severe chronic asthma due to exposure to noxious stimuli and concluded that appellant was totally disabled due to this condition.

In a February 4, 2004 report, Dr. Hughes noted that she had treated appellant "for severe asthma triggered by on-the-job exposure to paint and chemicals" since May 1, 2003. She reported that appellant "continues to have severe asthma, which is worsened by minimal exercise." Dr. Hughes opined that appellant was totally disabled from working despite the use of oral steroids to treat her asthma. She noted that appellant was "chronically fatigued from the work of breathing" and "has a constant dry, mild cough." Dr. Hughes stated that appellant's development of severe asthma "is directly attributable to the paint fumes and chemicals she was exposed to in her work environment."

The Office referred appellant, her medical records, a statement of accepted facts and a list of questions, to Dr. Robert L. Thomas, a Board-certified internist specializing in pulmonary disease, for a second opinion evaluation. In a November 16, 2004 report, Dr. Thomas reviewed the statement of accepted facts and medical record and the history of injury. A physical examination revealed appellant "coughing frequently in my office during the exam[ination]," symmetric chest, and faint rhonchi heard bilaterally during inspiration and expiratory phase of respiration. Dr. Thomas also reported a dry cough. Diagnostic testing revealed clear lungs by x-ray interpretation and a pulmonary function study revealed mild obstructive and restrictive impairment. He diagnosed "[h]istory of asthma worsened secondary to" paint fumes and dust exposure at work, chronic bronchitis and "[d]ifferential diagnosis includes ruling out vocal chord dysfunction. Dr. Thomas opined that appellant's employment-related condition had not resolved, but that she was capable of working with restrictions on exposure to smoke, dust particles or noxious fumes. He stated that appellant could not return to her date-of-injury position. In an attached work capacity evaluation form, Dr. Thomas indicated that appellant was capable of working four hours per day provided she was not exposed to fumes, gas, dust or smoke.

In a January 6, 2005 report, Dr. Hughes diagnosed chronic asthma which was permanently aggravated by the employment injury. She opined that appellant was totally disabled from working.

The Office referred appellant on January 26, 2005 to Dr. Steven A. Sahn, a Board-certified internist specializing in pulmonary disease, in order to resolve the conflict in medical opinion between Dr. Hughes, who opined that appellant was totally disabled from her employment injury, and Dr. Thomas, who opined that appellant was capable of working part time with restrictions.

In a February 28, 2005 report, Dr. Sahn provided a history of appellant's condition, describing her exposure to paint fumes on April 30, 2003 and her symptoms, including a persistent cough. A physical examination of the chest revealed "equal bilateral expansion, a

resonant percussion note, equal bilateral fremitus, and normal vesicular breath sounds." He opined that appellant "had an exacerbation of her allergic asthma following paint exposure in 2003" and generally "these types of exposures respond to appropriate therapy for asthma." Dr. Sahn opined that appellant did not have "RADS, Reactive Airways Dysfunction Syndrome, as the exposure did not appear to be a severe massive exposure to noxious fumes." He opined that appellant had no pulmonary impairment at the moment as her pulmonary functions were normal due to her use of medication. Dr. Sahn found that appellant's "asthma appears to be under good control."

In a supplemental report dated March 21, 2005, Dr. Sahn opined that appellant was capable of working from a pulmonary perspective and "should be physically capable of performing her duties as a rural carrier in a full-time capacity." A chest computerized tomography scan revealed no abnormalities in the lungs and a pulmonary function study was normal. He attributed appellant's persistent cough to poorly controlled gastroesophageal reflux disease (GERD).

On May 4, 2005 the Office proposed to terminate appellant's compensation and medical benefits on the grounds that Dr. Sahn's report established that appellant's accepted asthma condition was no longer causally related to her employment.

In a letter dated May 25, 2005, appellant's counsel noted disagreement with the proposal to terminate her benefits. She submitted factual and medical evidence including reports and clinical notes to support her entitlement to continued benefits.

In a report dated May 23, 2005, Dr. Hughes reiterated her opinion that appellant was totally disabled due to her accepted work-related asthma condition. She opined that appellant's return to work would trigger an asthma attack "by simply walking from her car into the workplace."

Appellant also submitted a report by Dr. Allan D. Lieberman, a Board-certified pediatrician specializing in occupational medicine, dated May 16, 2005, diagnosing reactive airways dysfunction syndrome and asthma due to her exposure to paint fumes on April 30, 2003.

By decision dated June 15, 2005, the Office finalized its decision to terminate appellant's compensation and medical benefits effective June 16, 2005.

In a letter dated September 9, 2005, appellant's counsel requested reconsideration. Appellant contended that Dr. Sahn's opinion was conclusory and, thus, is not entitled to the weight of the evidence an impartial medical examiner is usually accorded.

Appellant submitted an August 1, 2005 preliminary life care plan by Charlyne S. Butler, physical therapist; a June 28, 2005 report by Dr. Michael A. Spandorfer, a treating Board-certified internist with a subspecialty in pulmonary medicine; and a July 1, 2005 discharge summary by Dr. Hughes.

Dr. Hughes diagnosed acute exacerbation of asthma, chronic asthma due to occupational exposure, diabetes mellitus due to long-term use of prednisone which was secondary to chronic asthma and osteoporosis due to long-term use of prednisone which was secondary to chronic

asthma. During an office visit on June 27, 2005, she reported that appellant had "increased shortness of breath" and cyanotic toes. Dr. Hughes reported that appellant was admitted on June 27, 2005 for acute asthma exacerbation. During the course of appellant's hospitalization, she was diagnosed with diabetes, which Dr. Hughes attributed "to the past two years use of steroids to control her chronic asthma."

In his June 28, 2005 report, Dr. Spandorfer diagnosed persistent asthma, chronic cough, allergic rhinitis, cough variant asthma and GERD. He noted that appellant had "a history of occupational-induced asthma" which presented "with increasing difficulties of cough, shortness of breath and wheezing." A physical examination revealed respirations of 118, decreased chest volumes and "[a] persistent nonproductive cough is noted." Dr. Spandorfer reported that appellant now had acute asthma exacerbation.

By decision dated November 28, 2005, the Office denied appellant's request for modification of the termination of her compensation benefits.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] The Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[3]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[4]

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[5] Where a case is referred to an impartial medical specialist for the purpose of

[1] *See George A. Rodriguez*, 57 ECAB ___ (Docket No. 05-490, issued November 18, 2005); *Kathryn E. Demarsh*, 56 ECAB ___ (Docket No. 05-269, issued August 18, 2005). *See also Beverly Grimes*, 54 ECAB 543 (2003).

[2] *Kathryn E. Demarsh*, *supra* note 1.

[3] *James M. Frasher*, 53 ECAB 794 (2002).

[4] *James F. Weikel*, 54 ECAB 660 (2003).

[5] *Darlene R. Kennedy*, 57 ECAB ___ (Docket No. 05-1284, issued February 10, 2006).

resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.[6]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for an asthma attack. By decision dated June 15, 2005, the Office finalized its termination of appellant's compensation and medical benefits on the grounds that the accepted condition had resolved. The Office, therefore, bears the burden of proof to justify a termination of benefits.[7]

On January 26, 2005 the Office referred appellant to Dr. Sahn, a Board-certified internist specializing in pulmonary disease, in order to resolve the conflict in the medical opinion evidence between Dr. Hughes, who opined that appellant was totally disabled from her employment-related asthma, and Dr. Thomas, who opined that appellant was capable of working part time with restrictions. In February 28, 2005 report, Dr. Sahn provided a history of appellant's condition, describing her exposure to paint fumes on April 30, 2003 and her symptoms, including a persistent cough. He opined that appellant did not have "RADS, Reactive Airways Dysfunction Syndrome, as the exposure did not appear to be a severe massive exposure to noxious fumes." Dr. Sahn opined that appellant had no pulmonary impairment at the moment "as her pulmonary functions are normal," which was due to appellant's use of medication and that appellant's "asthma appears to be under good control." In a supplemental report dated March 21, 2005, he concluded that appellant was capable of working from a pulmonary perspective and "should be physically capable of performing her duties as a rural carrier in a full-time capacity." Dr. Sahn attributed appellant's persistent cough to poorly controlled GERD.

At the time of the Office referral to Dr. Sahn, there was no conflict in the medical opinion evidence regarding whether appellant continued to have residuals due to her accepted employment-related asthma condition, as the conflict in the medical evidence at the time of the referral was whether appellant was capable of working part time with restrictions.[8] The Board notes that the Office had advised appellant of such in the referral letter to Dr. Sahn. Consequently, the Board finds that Dr. Sahn served as an Office referral physician, rather than an impartial medical specialist, and there is a conflict in medical opinion with Dr. Hughes regarding whether appellant continues to have residuals and total disability due to her accepted employment-related asthma condition.

As there is an unresolved conflict in the medical evidence, the Office failed to meet its burden of proof to terminate medical and compensation benefits.

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[6] *John E. Cannon*, 55 ECAB ___ (Docket No. 03-347, issued June 24, 2004); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

[7] *Willa M. Frazier*, 55 ECAB ___ (Docket No. 04-120, issued March 11, 2004).

[8] *Joseph Roman*, 55 ECAB ___ (Docket No. 03-1883, issued January 8, 2004). (A physician was properly an impartial medical specialist with respect to the issue in conflict, the need for surgery, at the time appellant was referred to him. However, there was no medical conflict regarding appellant's disability for work at the time of the referral; therefore, the specialist was not an impartial medical specialist on other issues and his report was not entitled to special weight on these other issues).

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation and authorization for medical treatment effective June 16, 2005 on the grounds that she had no further disability or condition causally related to her accepted employment injury. As the Office's termination was improper, the Board need not address whether appellant met her burden of proof, following the Office's termination of compensation, to establish that she had any continuing employment-related disability after June 16, 2005.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 28 and June 15, 2005 are reversed.

Issued: August 17, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board