

**United States Department of Labor
Employees' Compensation Appeals Board**

GERALD W. MILLS, Appellant

and

DEPARTMENT OF AGRICULTURE, FOOD
SAFETY & INSPECTION SERVICE,
Greeley, CO, Employer

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-1512
Issued: March 10, 2006**

Appearances:
Sonja K. Mills, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 6, 2005 appellant filed a timely appeal of the January 6 and April 26, 2005 merit decisions of the Office of Workers' Compensation Programs that terminated his compensation effective June 7, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office has established that appellant's employment-related disability ended by June 7, 2004.

FACTUAL HISTORY

This case was before the Board on a prior appeal. By decision dated January 27, 2000, the Board found that the reports of appellant's attending physician, Dr. Ronald Balkissoon, an internist, were insufficiently rationalized to establish that his asthma was caused by his employment but were sufficient to require further development of the claim. The Board

remanded the case for referral of appellant, a statement of accepted facts and the case record to Dr. Balkissoon or another appropriate medical specialist for further evaluation, to be followed by an appropriate merit decision.¹

On March 20, 2002 the Office referred appellant, his medical records and a statement of accepted facts, to Dr. Naomi M. Fieman, Board-certified in allergy and immunology, for a second opinion evaluation of his condition and its relationship to appellant's employment. In a May 26, 2002 report, Dr. Fieman described appellant's history, complaints and findings on physical examination and pulmonary function studies. He concluded:

“In summary, our diagnosis at this time is occupationally[-]induced asthma, which is stable. Our clinical objective findings are as mentioned: Mild asthma related to initial work exposure. It is more probable than not that [appellant's] current symptoms are related to his initial injury. His current treatment includes, continuing with the therapy of the Flovent, Serevent and Albuterol per the recommendations of the National Jewish Hospital.² [Appellant] certainly cannot return to his initial environment. It would be possible for him to work part time in an environment where there would be no precipitating or aggravating triggers for this asthma. It would not be possible for him to do physical labor as this may trigger [appellant's] asthma and he certainly should not be around any environment where there would be strong odors, chemicals or fumes which could also trigger the asthma.”

In a June 26, 2002 memorandum, the Office noted that the original acceptance of aggravation was in error, as there had to be a preexisting condition present to accept any type of aggravation. The Office corrected the acceptance to reflect that the work environment was the direct cause of the development of occupational asthma and began payment of compensation for temporary total disability beginning July 3, 1997.

On April 2, 2004 the Office referred appellant, his medical records and a statement of accepted facts to Dr. Lawrence H. Repsher, Board-certified in pulmonary disease, for a second opinion evaluation of his condition and its relationship to appellant's employment. In an April 22, 2004 letter, his representative contended that every doctor and attorney she contacted about Dr. Repsher stated that he was renowned for his biased, subjective opinions and felt that his opinion would be that appellant never had asthma or that he did not contract it on the job. The Office replied on April 28, 2004 that it did not have any notion what Dr. Repsher's report was going to state and that all second opinion examiners were Board-certified and licensed in their state.

In a May 3, 2004 report, Dr. Repsher described appellant's history, complaints and findings on physical examination. Regarding the June 27, 1995 peak flow reading, he stated that peak flow readers were entirely inadequate for documenting any type of asthma, because of their inherent variability and because they were entirely under the control of the employee.

¹ Docket No. 98-1420 (issued January 27, 2000).

² This is the institution where appellant receives treatment from Dr. Balkissoon.

Dr. Repsher stated that the methacholine challenge tests on June 27, 1995 and January 5, 1996 were uninterrupted, and the later one was probably a negative test, showing markedly erratic effort-dependent testing and a positive response to placebo. He characterized the March 29, 1996 methacholine challenge test as “unequivocally negative, thus, entirely ruling out asthma of any kind, including occupational asthma.” Dr. Repsher stated that complete pulmonary function tests on July 14, 1997 were “entirely normal with a normal residual volume, which would again conclusively rule out any consideration whatsoever of asthma of any kind” and noted that spirometries on August 3, 2000, March 27, 2001 and May 1, 2002 were unequivocally normal. He diagnosed atopy, manifested by perennial allergic rhinitis as the result of allergies to general inhaled antigens, including a wide variety of trees, grasses and dust mites. Dr. Repsher stated that there was no evidence at any time of asthma or any other reversible airways obstructive disease, and that appellant never had any objective evidence of asthma, specifically no showing of airways obstruction on physical examination and no mention of wheezes in any of his records and that there were no medically interpretable pulmonary function tests that would suggest, let alone document, asthma.

On May 5, 2004 the Office issued a notice of proposed termination of compensation on the basis that appellant no longer had residuals of his accepted condition. In a May 19, 2004 letter, he stated that wheezing was reported on June 15, 1995 and March 29, 1996 and that the positive methacholine challenge test on January 5, 1996 led to Dr. Balkissoon’s diagnosis of asthma. By decision dated June 7, 2004, the Office terminated appellant’s compensation on that date.

On September 24, 2004 appellant requested reconsideration and submitted additional reports from Dr. Balkissoon. In a March 16, 2004 report, he stated that appellant’s history was compelling for work-related asthma, as he had significant improvement in his spirometry since being removed from work, despite ongoing cigarette smoking. Dr. Balkissoon stated that appellant would need ongoing medication indefinitely. In an August 25, 2004 report, he stated that there were several erroneous and inaccurate statements made by Dr. Repsher that had no foundation in fact and demonstrated either ignorance of the criteria for determining asthma and interpretation of pulmonary function tests or bias. He contended that Dr. Repsher said the exact same thing about virtually every patient with putative work-related asthma and that he had never heard or seen any report from Dr. Repsher that opined that someone could have a significant occupational lung problem. Dr. Balkissoon stated that Dr. Repsher’s statement that the January 5, 1996 methacholine challenge was uninterrupted, was unfounded, as the Ph.D. physiologist reported that the test was suboptimal but did not indicate it was questionable or uninterrupted. Dr. Balkissoon noted that there was no evidence of a positive response to placebo on this test and that on two separate occasions appellant demonstrated clearly positive methacholine challenge testing. He stated that Dr. Repsher demonstrated a simplistic view of asthma by arguing that just because pulmonary function tests were perfectly normal, the individual did not have asthma and by not referring to degree of reversibility and inhaled steroid requirements. Dr. Balkissoon concluded that to a reasonable degree of medical certainty appellant did indeed have work-related asthma, demonstrated by objective drops in his spirometry during periods of time at work compared to while away from work and that his asthma had not ceased.

On November 18, 2004 the Office referred appellant, the case record and a statement of accepted facts, to Dr. Jeffrey S. Schwartz, Board-certified in pulmonary diseases, to resolve the conflict of medical opinion between Dr. Balkissoon and Dr. Repsher. In a December 2, 2004 letter, appellant contended that there was no conflict of medical opinion.

In a December 16, 2004 report, Dr. Schwartz described appellant's history, his complaints including rare wheezing, findings on examination and pulmonary function testing on December 7, 2004. After reviewing his medical records, he stated that appellant developed symptoms typical for asthma in 1992 or 1993 with clear aggravation of symptoms, by history and report of decreased peak flows while performing work as a meat inspector. Dr. Schwartz agreed with the overall interpretations of appellant's three methacholine challenges as showing increased airway hyperresponsiveness. He agreed with Dr. Balkissoon that appellant had airway hyperresponsiveness and exacerbation when in the workplace, but strongly disagreed with his diagnosis of occupational asthma, stating that appellant may possibly have this condition but that there were far too many confounding features of his history to make this diagnosis. Dr. Schwartz cited three conditions that could each produce appellant's symptoms and airway hyperresponsiveness: smoking, which can lead to a positive methacholine challenge, allergic rhinitis and chronic rhinosinusitis and most importantly, gastroesophageal reflux disease, which was a well-known problem that could produce symptoms typical for asthma or exacerbate underlying asthma and was the most common reason for patients presenting with poorly controlled asthma. Dr. Schwartz concluded that appellant's occupational exposure to dusts and fumes would easily account for a temporary aggravation of his underlying disease that would last up to one to two weeks. The temporary nature of the aggravation was supported by appellant's history of a decrease in respiratory symptoms when he was removed from the workplace. The only disability appellant sustained was when he became significantly symptomatic in the workplace, but he had not worked in meat packing plants since 1997 and did not continue to have objective residuals of his work-related temporary aggravation of asthma. Dr. Schwartz agreed that Dr. Repsher's report was "filled with errors and potentially biased," but questioned whether Dr. Balkissoon was also biased in some of his conclusions.

By decision dated January 6, 2005, the Office found that the causal relation of appellant's work-related condition ceased by June 7, 2004. On January 24, 2005 appellant requested reconsideration and stated that he had not had dysphagia since a 1996 endoscopy and that he quit smoking in October 2003. By decision dated April 26, 2005, the Office found the additional evidence insufficient to modify its prior decisions.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³ In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such

³ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁴

ANALYSIS

There was a conflict of medical opinion in this case. Appellant's attending internist, Dr. Balkissoon, concluded that he had occupational-induced asthma and the Office accepted this condition. A second referral physician, Dr. Repsher, concluded that appellant did not have asthma or other reversible airways obstructive disease.

To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a), of the Federal Employees' Compensation Act,⁵ referred appellant, the case record and a statement of accepted facts to Dr. Schwartz, Board-certified in pulmonary disease. In a December 16, 2004 report, reviewed an accurate history and provided rationale explaining why he believed appellant's employment caused only a temporary aggravation of his asthma with brief periods of disability. Dr. Schwartz' conclusion that appellant's symptoms and airways hyperresponsiveness were due to smoking, allergic rhinitis and chronic sinusitis and gastroesophageal reflux disease is also supported by rationale. He reviewed the reports of Dr. Repsher and Dr. Dr. Balkissoon, stating his disagreements with certain findings and conclusions reached by both physicians. Dr. Schwartz found that the temporary aggravation of appellant's underlying disease by occupational factors would be for one or two weeks and that he had not had any occupational exposure since 1997. His report is entitled to special weight and establishes that appellant's employment-related disability ceased by June 7, 2004.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation with the report of Dr. Schwartz, an impartial medical specialist, who resolved a conflict of medical opinion.

⁴ *James P. Roberts*, 31 ECAB 1010 (1980).

⁵ 5 U.S.C. § 8123(a) states in pertinent part: "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."

ORDER

IT IS HEREBY ORDERED THAT the April 26 and January 6, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 10, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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