United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 06-1956**
	)	**Issued: January 24, 2007**
DEPARTMENT OF THE AIR FORCE, FAIRCHILD AIR FORCE BASE, WA, Employer	)	

Appearances:
Norman R. McNulty, Esq., 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 22, 2006 appellant filed a timely appeal from the July 12, 2006 decision of the Office of Workers' Compensation Programs, which terminated his compensation benefits effective May 26, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(1), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits on the grounds that he had no residuals or disability causally related to his accepted employment-related condition. In his appeal, appellant argued that the Office did not meet its burden of proof because the medical opinion of the impartial medical specialist was not adequately rationalized.

FACTUAL HISTORY

On May 8, 2002 appellant, then a 54-year-old training manager, filed an occupational disease claim, Form CA-2, alleging that polluted air in his building at the employing

establishment had caused upper respiratory and breathing ailments and ear, nose and throat-related illnesses. He stopped working on August 9, 2002. The Office accepted the claim on December 5, 2002 for allergic rhinitis.

On June 6, 2003 the Office scheduled an appointment for appellant with Dr. Charles F. Benage, a Board-certified otolaryngologist, to get a second medical opinion on appellant's condition. It provided Dr. Benage a statement of accepted facts (SOAF) indicating that appellant had worked in a converted warehouse with poor air circulation and no air filtration system. Air quality testing at the facility showed a wide variety of dust materials, including paper and clothing fibers, wood, ink toner, pollen, glass fiber, insect debris, plant hairs, bird debris and other irritants. The SOAF also stated that appellant had a history of smoking and had stopped smoking intermittently since 1978.

Dr. Benage reported the results of his examination on July 8, 2003. He diagnosed appellant with rhinitis medicamentosa, which he believed was caused by excessive use of Afrin, an over-the-counter nasal decongestant spray appellant used in conjunction with a continuous positive airway pressure devise prescribed for sleep apnea. Dr. Benage also indicated that appellant had significant inhalant allergies that were likely due to exposure to allergens in the workplace. He opined that appellant would be able to return to work without restriction if he stopped using Afrin and continued getting shots to control his inhalant allergies.

Appellant's treating physician, Dr. Edgar A. Figueroa, a Board-certified family practitioner, stated in a July 29, 2003 letter that his condition would not allow him to return to his employment because of his need for continuous therapy and medication. Dr. Figueroa stated that appellant's health showed no signs of improvement and that his frequent episodes of severe allergic reactions, ear and sinus infections, bronchitis, internal hemorrhoids, extreme fatigue and prostatic hyperplasia complicated his treatment. He incorporated the findings of an earlier report, in which he diagnosed appellant with chronic sinusitis, chronic rhinitis, chronic obstructive pulmonary disease, chronic ear infections, sleep apnea and depression. Dr. Figueroa stated that there was no cure for appellant's condition.

Based on the reports of Drs. Benage and Figueroa, the Office determined that there was a conflict in the medical evidence and referred appellant to a referee physician. Dr. Reynold Karr, Jr., a Board-certified rheumatologist, examined appellant on October 27, 2003. He provided a report of the same date answering the specific questions posed by the Office and a supplemental report containing the results of diagnostic tests. Dr. Karr diagnosed appellant with allergic rhinitis, which was "accepted as being medically connected to the federal employment," and with rhinitis medicamentosa, which he stated was more probably than not unrelated to federal employment. He stated that appellant's obstructive sleep apnea was related to both forms of rhinitis, as well as obesity. Dr. Karr also diagnosed appellant with chronic frontal and ethmoidal sinusitis, which he believed was equally related to both forms of rhinitis and with infrequent otitis media (inflammation of the inner ear), which he found to be related to the sinusitis. He indicated that appellant's smoking most likely contributed to his rhinitis and sinusitis. Dr. Karr did not find appellant's depression to be related to federal employment factors.

Dr. Karr stated that he was of the opinion that appellant did continue to suffer from allergic rhinitis, but that it was unrelated to the federal employment, as appellant's symptoms had not changed after a year of absence from the federal workplace and there was no objective evidence of a causal link. He stated that "the presence of only a temporal relationship is insufficient to prove causality." Dr. Karr believed that it was more likely than not that the symptoms were related to infrequent cigarette smoking, regular use of Afrin and possibly exposure to dander from appellant's two dogs. He found appellant's physical limitations to be frequent disruption of activity because of coughing, sneezing and nasal congestion and fatigue arising out of these symptoms and sleep apnea. Dr. Karr stated that appellant needed to work in a clean air environment. He indicated that appellant would be employable on a part-time basis in his current condition and on a full-time basis once his condition had been thoroughly evaluated and properly managed.

On November 10, 2003 Dr. Karr reported that the results of the *in vitro* allergy test were uniformly negative for the specific IgE antibodies tested, including dog and cat dander, dust mite species, seasonal pollens and mold. The test indicated that appellant was within the normal range of IgE antibodies. Dr. Karr also stated that he had reviewed some factual information he received about the building in which appellant worked. Dr. Karr concluded that none of the additional information provided objective evidence that changed the opinion in his October 28, 2003 report.

In a December 29, 2003 letter, the Office informed appellant that it proposed termination of his wage loss and medical benefits based on Dr. Karr's report. In an attached memorandum, the Office explained that the weight of the medical evidence supported Dr. Karr's opinion that appellant's current symptoms were not work related.

Appellant responded to the proposed termination on January 25, 2004. He argued that the medical opinion of the impartial medical specialist was insufficient to terminate compensation because it was not properly rationalized. Specifically, appellant claimed that Dr. Karr did not explain why the accepted condition of allergic rhinitis was temporally limited and could not have created a permanent condition. He also argued that the Office should continue medical and lost wages benefits because the impartial medical specialist indicated that appellant was still at least partially disabled because of allergic rhinitis, a condition the Office had accepted as being employment related.

On April 7, 2004 the Office requested that Dr. Karr supplement his report by clarifying his opinions on appellant's disability status, the recommended work restrictions, the causal relationship between appellant's current condition and his federal employment and what he meant by the term "temporal relationship" in his initial report. It also asked how he would alter his opinions on appellant's disability if he discontinued use of Afrin.

In his supplemental report dated May 12, 2004, Dr. Karr stated that appellant would be able to work four hours per day in his current condition and eight hours per day when his rhinitis had been adequately treated. He opined that discontinued use of Afrin was unlikely to have a significant effect without other interventions, such as smoking cessation. Dr. Karr indicated that appellant would need to work in an environment without strong smells, smoke, dust or mold growth. He explained that his opinion about the relationship between appellant's rhinitis and his

employment was based on the record's lack of a "positive test or provocative challenge" to a unique occupational allergen. Dr. Karr also stated that by "temporal relationship" he meant a short time interval between occupational exposure and development of symptoms.

On April 27, 2004 the Office referred appellant to Dr. David D. Bot, a Board-certified psychiatrist, for a second opinion on his diagnosed depression. Dr. Bot examined appellant on June 9, 2004. He diagnosed major depression, mild severity and found it was causally related to the accepted condition of allergic rhinitis. Dr. Bot stated that the rhinitis appeared to have precipitated the depression and that no nonwork stress situations contributed to it. He also stated that from a psychiatric standpoint, appellant would be able to perform any job that was within his physical capacity.

On December 29, 2004 the Office again notified appellant of proposed termination of his compensation and medical benefits on the grounds that Dr. Karr provided evidence that appellant's current disability was unrelated to his federal employment. It found that Dr. Karr's opinion was well rationalized and based on objective medical records. The Office stated that Dr. Karr's opinion was supported by the fact that appellant had not been exposed to the work environment for over a year.

On January 17, 2005 appellant opposed the Office's proposed termination on the grounds that it did not meet the burden of showing that appellant's disability was no longer related to his federal employment. Specifically, appellant noted that the Office did not address Dr. Bot's report and argued that it relied unduly on Dr. Karr's report. Appellant argued that Dr. Karr's conclusion that his condition was not work related because exposure to work factors had ceased the prior year was not supported by reasoned analysis.

By decision dated May 26, 2005, the Office terminated appellant's wage-loss benefits. It found that Dr. Karr's opinion was supported by thorough examinations and diagnostic tests and the fact that appellant had not been exposed to the work environment in the year prior to his examination. The Office noted that, according to Dr. Bot's opinion, appellant's depression would not impact his ability to work.

Appellant filed an appeal of this decision on July 14, 2005. By letter dated July 19, 2005, the Board requested the case record from the Office. Not having received the record, on March 20, 2006 the Board remanded the case to the Office for reconstruction and proper assemblage of the case record. The Office reissued its decision terminating appellant's wage-loss benefits on July 12, 2006.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[1] It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.[2]

[1] *Elaine Sneed*, 56 ECAB ___ (Docket No. 04-2039, issued March 7, 2005).

[2] *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

The Federal Employees' Compensation Act provides that, if there is a 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.[3] The implementing regulation states that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.[4]

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.[5]

ANALYSIS

The Office accepted appellant's claim of allergic rhinitis in December 2002. Appellant stopped working in August 2002 and has not worked since that time.

In June 2003, the Office referred appellant to Dr. Benage, a Board-certified otolaryngologist, to secure an opinion as to the severity and likely duration of appellant's disability. Dr. Benage diagnosed appellant with rhinitis medicamentosa, which was completely unrelated to the accepted employment factors. He stated that appellant would be able to return to work without restriction once he stopped using the nasal spray Afrin. Appellant's personal physician, Dr. Figueroa, a Board-certified family practitioner, disagreed with Dr. Benage's report. He stated that appellant's employment-related condition was chronic and that he was permanently disabled from work.

Given the disagreement between Drs. Benage and Figueroa regarding appellant's diagnosis and level of disability, the Office properly found a conflict of medical opinion evidence and referred appellant to Dr. Karr, a Board-certified rheumatologist, to act as the impartial medical specialist and resolve the conflict of medical opinion evidence.

Dr. Karr conducted an examination and diagnosed appellant with allergic rhinitis, which he accepted as being medically connected to appellant's federal employment. He stated that while appellant did "continue to suffer from allergic rhinitis," in his opinion, appellant's "current nasal and sinus symptoms, whether allergic or nonallergic, are unrelated to the workplace conditions of exposure at the employing establishment on a more probable than not basis. In my view, the presence of only a temporal relationship is insufficient to prove causality." This opinion was based on the facts that the record contained no evidence of a specific allergen in appellant's workplace to which he had a negative reaction and that appellant had not been exposed to his workplace in more than a year. He opined that the persistent nasal and sinus

[3] 5 U.S.C. §§ 8101-8193, 8123(a).

[4] 20 C.F.R. § 10.321.

[5] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

symptoms were more likely related to infrequent cigarette smoking and regular use of an over-the-counter nasal spray. In a supplemental report dated May 12, 2004, Dr. Karr stated that discontinued use of nasal spray would not have a significant effect on appellant's condition without other interventions, including smoking cessation. The results of *in vitro* allergy testing indicated that appellant was within the normal range for all allergens tested.

When the report of an impartial medical specialist is not sufficiently well reasoned, it is not accorded special weight as medical opinion evidence.[6] The Board finds that Dr. Karr's report is not sufficiently well reasoned to constitute the special weight of the medical opinion evidence. His report does not provide adequate medical reasoning for the opinion that appellant's allergic rhinitis, which he accepted as being related to appellant's employment, was not the cause of his ongoing nasal and sinus symptoms.

Dr. Karr opined that appellant's current symptoms were unrelated to his exposure to unclean air at the employing establishment and were related instead to cigarette smoke and overuse of Afrin. He stated that his opinion was based partially on the fact that appellant was symptomatic, but had not been exposed to the polluted work environment for over a year. However, Dr. Karr does not indicate the normal duration of allergic rhinitis following removal of allergens. His report is silent as to whether any residuals of allergic rhinitis could affect or be affected by subsequent exposure to allergens. Dr. Karr also based his opinion on the fact that no objective evidence linked the accepted condition of rhinitis to allergens at the employing establishment. This challenge appears to apply more to the initial acceptance of the claim than whether or not appellant's current condition is related to the accepted condition.[7]

Additionally, Dr. Karr gave no rationalization for his opinion that cigarette smoke and Afrin were the more likely causes for appellant's ongoing nasal and sinus symptoms. He did not explain how he determined that the symptoms he observed were the result of these factors rather than the result of physical changes initiated by a polluted work environment.

The lack of medical reasoning on the critical issue of whether appellant's current condition is causally related to the accepted condition of allergic rhinitis makes Dr. Karr's report insufficient to constitute the special weight of the medical opinion evidence. As the record contains an unresolved conflict of medical opinion evidence, the Board finds that the Office has not met its burden of proof to terminate appellant's compensation benefits.

CONCLUSION

The Board finds that the report of the impartial medical specialist Dr. Karr was not sufficiently rationalized to constitute the special weight of the medical evidence. Therefore,

[6] *Elaine Sneed*, *supra* note 1; *Newton Ky Chung*, 39 ECAB 919 (1988).

[7] *See Willa M. Frazier*, 55 ECAB 379, 385 (2004) ("it is a denial of administrative due process to terminate compensation benefits on the ostensible grounds that a claimant no longer suffers residuals of an accepted condition, where the record supports that the real reason for the Office's action was that it had determined that the condition was not causally related to the claimant's employment and should not have been accepted as such").

there remains an unresolved conflict of medical opinion evidence preventing the Office from meeting its burden of proof to terminate appellant's compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 12, 2006 is reversed.

Issued: January 24, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board