United States Department of Labor
Employees' Compensation Appeals Board

C.N., Appellant	)	
and	)	
DEPARTMENT OF THE NAVY, NAVAL COMMAND CONTROL OCEAN SURVEILLANCE CENTER, San Diego, CA, Employer	)	**Docket No. 07-1259** **Issued: October 2, 2007**

Appearances:
Appellant, pro se
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 April 5, 2007 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated March 13, 2007 and a July 18, 2006 decision denying his request for subpoenas. 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 abused its discretion in denying appellant's request to postpone a scheduled hearing and conducting a review of the written record; (2) whether the Office properly denied his requests for subpoenas; and (3) whether appellant met his burden of proof to establish that he had a permanent aggravation of allergic rhinitis or disability causally related to factors of his federal employment.

FACTUAL HISTORY

This is appellant's third appeal to the Board. By order dated December 20, 1999, his appeal was dismissed by the Board at his request.[1] In a decision dated December 4, 2002, the Board remanded the case to the Office for development of a statement of accepted facts and specific questions to be addressed by an allergy specialist as to whether he sustained allergic reactions or allergy-related conditions causally related to factors of his work environment. If so, whether appellant sustained any periods of compensable disability.[2] The law and the facts of the previous Board decisions and orders are incorporated herein by reference.[3]

On April 1, 2003 the Office referred appellant to Dr. Edward Federman, a Board-certified pulmonologist, for a second opinion evaluation. By report dated July 9, 2003, Dr. Federman noted his review of the medical records, appellant's preexisting allergy to house dust and employment history, including exposure to dust in a warehouse environment from November 28, 1995 to June 12, 1996.[4] He provided examination findings and performed pulmonary function testing (PFT) that demonstrated a moderate restrictive ventilatory defect which had improved since 1997. Computerized tomography of the chest was negative. Dr. Federman diagnosed allergic rhinitis with no evidence of pulmonary fibrosis or interstitial lung disease. In answer to specific Office questions, appellant had no evidence of exercise limitation and that, while he continued to suffer from allergic rhinitis on the basis of preexisting allergies including a dust allergy, there was no evidence of any exacerbation of this condition based on his work exposure. Thus, his current condition was not caused, aggravated, precipitated or accelerated by employment-related dust exposure and any work-related condition had ceased. Dr. Federman concluded that appellant had no total disability related to the work exposure of 1995 to 1996 and that his prognosis was excellent but that he should avoid workplace exposures where dust or other allergens were present.

By decision dated September 19, 2003, the Office denied the claim.

On October 15, 2003 appellant requested a hearing. In an April 22, 2004 decision, an Office hearing representative remanded the case for Dr. Federman to determine if appellant had any periods of work-related aggravation of his allergic rhinitis. In a report dated June 4, 2004, Dr. Federman noted that appellant was exposed to minimal levels of dust at work from November 18, 1995 to June 12, 1996. Upon review of the medical record, he opined that appellant experienced an aggravation of his allergic rhinitis but was not disabled due to this dust exposure because his only symptoms were a minor irritation and cough which were relieved by wearing a dust mask.

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[1] Docket No. 99-1632 (issued December 20, 1999).

[2] Docket No. 02-1605 (issued December 4, 2002).

[3] The record also contains documentary and medical evidence regarding claims adjudicated by the Office under file numbers 131107829 and 131118205. The instant claim was adjudicated under file number 131139424.

[4] Appellant was removed from employment effective September 12, 1996 due to his physical inability to perform the position.

On July 19, 2004 the Office accepted that appellant sustained a temporary aggravation of preexisting allergic rhinitis from November 28, 1995 to July 12, 1996. By decision dated July 19, 2004, the Office denied that appellant had any periods of disability causally related to the work injury.

On August 15, 2004 appellant requested a hearing and on October 12, 2004, requested that documents and specific witnesses be subpoenaed. In an April 7, 2005 decision, an Office hearing representative denied his request for subpoenas. A hearing scheduled for April 26, 2005 was postponed at appellant's request. On July 18, 2006 an Office hearing representative again denied appellant's request for subpoenas. Appellant did not appear at the hearing, rescheduled for July 31, 2006. On October 25, 2006 he was notified that the hearing had been rescheduled for December 5, 2006. On November 14, 2006 appellant requested a postponement, stating that he would be out of the country. By letter dated December 18, 2006, the Office denied his request for a postponement and advised that a review of the written record would be conducted. By decision dated March 13, 2007, an Office hearing representative affirmed the July 19, 2004 decision.

LEGAL PRECEDENT -- ISSUE 1

Section 10.622 of the Office's regulations provides that once an oral hearing is scheduled and the Office has sent the claimant the appropriate written notice, the oral hearing cannot be postponed at the claimant's request except where the claimant is hospitalized for a reason that is not elective or where the death of the claimant's parent, spouse or child prevents attendance at the hearing. When the request to postpone the hearing does not comport with these requirements and it cannot be accommodated on the docket during the same hearing trip, no further opportunity for an oral hearing will be provided. Instead a review of the written record will be performed or, at the discretion of the hearing representative, a teleconference will be held.[5]

ANALYSIS -- ISSUE 1

The Board finds that the Office acted within its discretion in denying appellant's request to postpone a scheduled hearing and in conducting a review of the written record. Section 10.622 of the Office's regulation provides that, once the oral hearing is scheduled and the Office has sent appellant the appropriate written notice, the oral hearing cannot be postponed at the claimant's request except where the claimant is hospitalized for a reason that is not elective or where the death of the claimant's parent, spouse or child prevents attendance at the hearing. When the request to postpone the hearing does not comport with these requirements and it cannot be accommodated on the docket during the same hearing trip, no further opportunity for an oral hearing will be provided. Instead a review of the written record will be performed or, at the discretion of the hearing representative, a teleconference will be held.[6] In this case, on October 25, 2006 appellant was notified that the hearing had been rescheduled on December 5, 2006. In November 2006, he requested a postponement because he would be out of the country. On December 18, 2006 the Office notified him that a postponement would not be

[5] 20 C.F.R. § 10.622(b), (c).

[6] *Id*.

granted and a review of the written record would be conducted. As appellant did not indicate that his reason for requesting a postponement was his hospitalization or a death in the family, the Office hearing representative acted properly in denying the requested hearing and conducting a review of the written record instead.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Federal Employees' Compensation Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. The implementing Office regulation provides that subpoenas for documents will be issued only where the documents are relevant and cannot be obtained by any other means. The Office hearing representative retains discretion on whether to issue a subpoena.[7] A claimant may request a subpoena only as part of the hearings process and no subpoena will be issued under any other part of the claims process. To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[8] Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts[9] and in requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[10] The function of the Board on appeal is to determine whether there has been an abuse of discretion.[11]

ANALYSIS -- ISSUE 2

In this case, appellant requested subpoenas for the production of documents and the appearance of various personnel. The Board, however, finds that the Office hearing representative did not abuse her discretion in denying appellant's subpoena requests. In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[12] Appellant did not show why the information he sought could not be obtained other than through the subpoena process.[13]

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[7] 20 C.F.R. § 10.619.

[8] *Id*. at 10.619(a)(1).

[9] *Gregorio E. Conde*, 52 ECAB 410 (2001).

[10] 20 C.F.R. § 10.619(a)(2).

[11] *Gregorio E. Conde*, *supra* note 9.

[12] *Claudio Vazquez*, 52 ECAB 496 (2001).

[13] *Janet L. Terry*, 53 ECAB 570 (2002).

The Office hearing representative did not abuse her discretion in not issuing subpoenas as requested by appellant.[14]

LEGAL PRECEDENT -- ISSUE 3

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of claimant's own conduct as an independent intervening cause. The basic rule is that, a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[15] Under the Act,[16] when employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the periods of disability related to the aggravation. When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased, even if the employee is medically disqualified to continue employment because of the effect work factors may have on the underlying condition.[17]

Under the Act, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.[18] Furthermore, 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.[19]

ANALYSIS -- ISSUE 3

The Board finds that appellant did not sustain a permanent aggravation of his preexisting allergic rhinitis condition. As discussed in the Board's December 4, 2002 decision,[20] in a February 15, 1996 report, Dr. Brian P. Frist, Board-certified in internal medicine and

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[14] *Id.*

[15] Larson, *The Law of Workers' Compensation* § 10.01 (December 2000); *see Charles W. Downey*, 54 ECAB 421 (2003).

[16] 5 U.S.C. §§ 8101-8193.

[17] *See Raymond W. Behrens*, 50 ECAB 221 (1999).

[18] *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[19] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[20] *Supra* note 2.

endocrinology, noted that appellant had been subjected to adverse working conditions which caused an exacerbation of his allergy symptoms. A March 11, 1996 report with an illegible signature, noted that appellant had dust problems at work which caused fatigue due to sleep loss. Allergic rhinitis and bronchitis by history were diagnosed. An employing establishment physician, Dr. Roy S. Kennon, Board-certified in occupational medicine, provided an April 1, 1996 report in which he noted appellant's complaints of frequent coughing at work and multiple allergies with increased symptomatology secondary to work exposure. Dr. Kennon recommended an air-purifying respirator. In a May 29, 1997 attending physician's report, Dr. David F. Polster, a Board-certified pulmonologist, noted a history of allergic reactions to dust, dirt and fungi, abnormal PFTs and positive allergy testing. He diagnosed allergic rhinitis and checked "yes" to a form question, indicating that the condition was employment related. Dr. Polster also advised that appellant had no disability. Appellant submitted no further relevant medical evidence.[21] In reports dated July 9, 2003 and June 4, 2004, Dr. Federman, who performed a second opinion evaluation for the Office, diagnosed allergic rhinitis that preexisted appellant's work exposure to dust. He opined that appellant had a temporary aggravation due to employment exposure but that this condition ceased on June 12, 1996.

While these reports are sufficient to establish that in the period appellant was working in a dusty work environment his preexisting allergic rhinitis was exacerbated, none addressed whether the work-related aggravation was permanent. These reports are therefore insufficient to establish that any aggravation of appellant's accepted condition was permanent. Rather, they establish that he sustained a temporary aggravation of his preexisting allergic rhinitis, which had resolved by June 12, 1996. Furthermore, the opinions are insufficient to establish that appellant was disabled at any time due to the accepted conditions. Dr. Frist and Dr. Kennon did not provide an opinion regarding appellant's ability to work and medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[22] Dr. Polster and Dr. Federman advised that appellant had no disability. As the record contains no medical opinion that appellant was disabled from the accepted temporary aggravation of allergic rhinitis, he failed to meet his burden of proof.

CONCLUSION

The Board finds that the Office did not abuse its discretion in denying appellant's request for a postponement of a scheduled hearing and conducting a review of the written record instead or in denying his request for subpoenas. The Board further finds that appellant did not meet his burden of proof to establish that he sustained a permanent aggravation of his allergic rhinitis causally related to employment factors and did not establish that he sustained any disability from the accepted temporary aggravation.

[21] The record does contain medical reports concerning orthopedic conditions and an eye injury, not relevant to this case.

[22] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 13, 2007 and July 18, 2006 be affirmed.

Issued: October 2, 2007
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