

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

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L.M., Appellant )  
and ) Docket No. 08-326  
DEPARTMENT OF TRANSPORTATION, ) Issued: August 14, 2008  
FEDERAL AVIATION ADMINISTRATION, )  
San Diego, CA, Employer )  
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*Appearances:*

*Alan J. Shapiro, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 13, 2007 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated September 24, 2007 finding that she had not established a condition causally related to her federal employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has met her burden of proof in establishing that she developed multiple chemical sensitivity or toxic encephalopathy due to exposures to fragrances in her workplace.

**FACTUAL HISTORY**

On June 16, 2006 appellant, then a 48-year-old air traffic control specialist, filed an occupational disease alleging that she developed toxic encephalopathy and multiple chemical sensitivity due to exposure to a coworker's cologne beginning on April 20, 2006. She stated that

she became extremely ill on May 11, 2006. In the accompanying statement, appellant alleged that in February 2006 she found a coworker's cologne disagreeable and that she began to develop headaches due to his cologne in April 2006. On May 12, 2006 she developed a headache, chemical taste in her mouth and tingling in her mouth, tongue and hands after exposure to a coworker's cologne. Appellant also noticed spots on her hands, experienced shortness of breath, dizziness and nausea. She stated that she tripped walking down the stairs as she left work and that the left side of her body felt strange. Appellant stated that she developed an aversion to any chemical fragrance over the next several days. She also experienced mental confusion, arthritis-like symptoms, loss of appetite and difficulty sleeping. Appellant stated that her symptoms gradually abated and that her physician released her to return to work on June 2, 2006. She noted that when she initially begun work at the employing establishment in 2005 she developed headaches, which she now believed were due to the perfume that her supervisor wore.

Dr. Jeoffry Bruce Gordon, a Board-certified family practitioner, diagnosed toxic encephalopathy on May 19, 2006 and stated that appellant required a fragrance-free environment. In a report dated June 5, 2006, Dr. Gordon stated, “[Appellant] has an acute and persistent multisystem clinical syndrome consistent with exposure to a toxic environmental substance. As is common in cases like this, [appellant] gives a history of prior sensitivity to various environmental substances which she was able to tolerate and minimize their impact by repeated avoidance. In this case, because of the circumstances of her work environment this was not possible. I doubt she has an ordinary allergy, infection, other bodily malfunction or psychiatric syndrome.... Her diagnosis is toxic encephalopathy or multiple chemical sensitivity syndrome.” Dr. Gordon opined that appellant’s condition was caused by her work environment, specifically the cologne worn by her coworker.

In a letter dated June 26, 2006, the Office requested additional factual and medical evidence in support of appellant’s claim. The employing establishment submitted a statement from appellant’s coworker, Shawn C. Hagen, noting that on May 12, 2006 his supervisor informed him that appellant was affected by the cologne he was wearing. Mr. Hagen agreed voluntarily not to wear that particular cologne in appellant’s presence.

Appellant filed a traumatic injury claim for May 12, 2006, alleging that she developed headaches and other symptoms following exposure to a coworker’s cologne. She submitted a statement dated July 22, 2006 and stated that Mr. Hagen began training in February 2006 and that his cologne impacted her then. Appellant noted that she was only exposed to Mr. Hagen for brief periods in February 2006 as they were seldom both in the tower at the same time. The exposures to Mr. Hagen and his cologne extended to 30 to 45 minutes at a time in April 2006. Appellant stated, “I was scheduled to work with Mr. Hagan three days a week. Trying to avoid exposure I took annual leave as much as I could, on the days when I was scheduled to work with him. On the days that I had to work with him, I would ask to change my shift assignment to minimize our shift overlap and my exposure. I would estimate my exposure to be one to two days a week, between two and five hours per day, since early April.”

Appellant submitted an additional report from Dr. Gordon dated August 7, 2006 repeating his earlier diagnoses and conclusions. Dr Gordon further noted that he had relied on testing from the emergency room and a Board-certified neurologist Dr. J. Steven Poceta, which

were normal. Dr. Gordon noted that Dr. John Montague, a psychologist, examined appellant and found no diagnosable psychiatric condition.

By decision dated September 14, 2006, the Office denied appellant's claim finding that the medical evidence did not establish that her diagnosed condition of toxic encephalopathy or multiple chemical sensitivity resulted from her exposure to a coworker's cologne. Appellant, through her attorney, requested an oral hearing on September 27, 2006. She submitted medical records including a report dated May 25, 2006, which stated that appellant sought treatment due to mental status changes. Dr. Poceta noted that on March 23, 2006 appellant reported symptoms of confusion and paranoia. Appellant believed that a coworker was attempting to poison her through toxic cologne and adding toxins to her water bottle. Dr. Poceta opined that appellant's condition was likely due to some underlying psychiatric condition or underlying encephalitis. In a report dated August 11, 2006, he stated that appellant's electroencephalogram and magnetic resonance imaging scans were normal. Dr. Poceta diagnosed migraine "probably triggered by a perfume."

Dr. Montague, a clinical psychologist, completed a report on June 29, 2006 and described appellant's history of injury on May 12, 2006. He also provided a history of appellant's interactions with Mr. Hagen noting that he lived with her for a few days when he first began working at the employing establishment. Dr. Montague stated:

"He moved to San Diego in late September 2005 and she thought that they had an agreement that he would be there only temporarily while he looked for his own residence. Their relationship became increasingly contentious between September and December 2005 and she came to believe that he 'had the intent to use me and move on.' [Appellant] wanted him to move out and he did not, while she did not want to be rude or have to put her foot down. He was scheduled to leave for additional training and the day before he was to leave, she kicked him out because he was rude to her."

While Mr. Hagen lived with appellant she informed him that cologne and perfumes bothered her so he stopped wearing scents. After he returned from training and began working with appellant, his use of cologne increased. Appellant then asked for a sweatshirt back and he complained to the union stating that she was embarrassing him and requesting protection from her. She was instructed not to embarrass Mr. Hagen and he stopped speaking to her. Appellant alleged that his cologne usage increased. Dr. Montague noted that appellant feared that Mr. Hagen had placed pesticide in her water when she kicked him out of her apartment and that she feared that he would take action to cause her to be unable to complete her training. He noted that she later attributed these statements to her diminished mental capacity at the time. Dr. Montague concluded that appellant did not have a diagnosable psychiatric condition, but stated that a conversion disorder was difficult to rule out because of her diagnosis of multiple chemical sensitivity syndrome. He noted that appellant had a conflicted relationship with Mr. Hagen and that it was his cologne that triggered her somatic symptoms. Dr. Montague stated, "The emotional distress that she felt over their relationship and the repressed hostility that I speculate she had for him might have manifested in physical symptoms, including underpinning or exacerbating her sensitivity to chemicals particularly the chemicals in his cologne."

Dr. Kaye H. Kilburn, Board-certified in preventative medicine, completed a report on November 9, 2006 noting appellant's alleged employment-related exposure to cologne. He provided the results of testing and diagnosed chemical encephalopathy due to cologne and other chemicals, chemical intolerance due to cologne and other chemicals, visual impairment for color and defects and impaired odor perception from cologne and other chemicals. Dr. Kilburn stated, "A causal connection to cologne and other chemicals is most likely because there are no other significant exposures and an absence of spontaneous or associated neurological or psychiatric disease."

In a report dated November 22, 2006, Dr. Gordon reviewed the medical evidence and noted appellant's history of injury. He stated that he ordered a brain single photon emission computed tomography (SPECT) scan, which revealed decreased radiotracer uptake of the left temporal lobes and was consistent with a toxic chemical injury to the brain. Dr. Gordon concluded that appellant had an acute and persistent multisystem clinical syndrome due to exposure to toxic environmental substances.

Appellant testified at a telephonic hearing on March 30, 2007. She stated that prior to May 12, 2006 she had "chemical sensitivity" when carpets were installed or the building was painted. Appellant noted increased symptoms at the end of 2005 including breathing problems and heart palpitations. She noticed that these symptoms arose when she was present with others who were wearing cologne or perfume, specifically Mr. Hagen. Appellant stated that she worked three or four feet from Mr. Hagen. She stated that she believed that Mr. Hagen wore Axe Body Spray. Appellant described the prior relationship with Mr. Hagen noting that he lived with her from the end of September to the beginning of December 2005. Following the oral hearing, she submitted a report dated June 7, 2007 from Dr. Terence M. Davidson, a Board-certified surgeon of professorial rank, who diagnosed nasal chemical sensitivity and recommended a fragrance free workplace.

The hearing representative issued a decision on July 11, 2007 and remanded the case for the Office to combine the records and consider the reports of the second opinion physician scheduled in a separate claim.<sup>1</sup> The Office doubled the claims on July 10, 2007.

In a report dated May 11, 2007, Dr. Thomas C. Bruff, Board-certified in preventive medicine and Office second opinion physician, noted appellant's history of symptoms beginning in August 2005. He described appellant's symptoms on May 12, 2006 and her correlation of these symptoms to her coworker's use of scented products. Dr. Bruff provided the results of appellant's physical examination and diagnostic testing. He requested additional medical records to ascertain whether the diagnosed condition of multiple chemical sensitivity had been established. On August 18, 2007 Dr. Bruff reviewed additional medical reports and concluded that appellant did not have altered anatomy or physiology that was the basis for her condition of multiple chemical sensitivity. He stated, "The physical manifestations described by [appellant] heart palpitations, visual hallucinations and numbness and tingling, are not the result of any odor or exposure at her place of employment. She uses several devices which she states are helpful. However, my experience with these products is that there is no physiologic basis for the improvement with these products. The mask and ozone generator may provide psychologic benefit, but that is all." Dr. Bruff opined that appellant did not have a medical condition present as a result of her employment.

Appellant submitted a grievance filed on July 10, 2006 regarding the excessive use of fragrance products at the employing establishment.

By decision dated September 24, 2007, the Office denied appellant's claim for an occupational disease. It found that the weight of the medical opinion evidence rested with the opinions of Dr. Bruff and that appellant's condition was not causally related to cologne exposure at work.

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<sup>1</sup> On November 3, 2006 appellant, then a 48-year-old air traffic control specialist, filed a traumatic injury claim alleging that on October 18, 2006 she developed a throbbing headache, numbness on the side of her body, shortness of breath and ringing in her ears due to exposure to noxious chemical odors from scented products. By decision dated December 19, 2006, the Office accepted her claim for temporary aggravation of toxic encephalopathy which resolved by October 30, 2006. This claim does not contain an adverse decision and the Board will not consider it on appeal. 20 C.F.R. § 501.2(c).

Appellant filed a second traumatic injury claim for exposure to noxious chemicals on December 15, 2006 alleging on December 5, 2006 she developed shortness of breath, throbbing headache, numbness on the side of her face, ringing in her ears and "problems with her right eye." By decision dated September 6, 2007, the Office denied appellant's claim finding that the medical evidence submitted was not sufficient to establish a diagnosed condition. Appellant, through her attorney, requested a telephonic hearing on the September 6, 2007 decision on September 15, 2007. The record before the Board does not contain a final decision on this claim as appellant has requested a telephonic hearing before the Branch of Hearings and Review and the Board will not address the December 15, 2006 exposure on appeal. 20 C.F.R. § 501.2(c).

Appellant filed a claim for chemical exposure on January 27, 2007 alleging that she was exposed to noxious chemical odors from scented products. By decision dated September 25, 2007, the Office denied appellant's claim finding that she had not established the employment exposure alleged. Appellant, through her attorney, requested a telephonic hearing on September 29, 2007. The record before the Board does not contain a final decision on this claim as appellant has requested a telephonic hearing before the Branch of Hearings and Review. Therefore, the Board will not consider this claim on appeal. 20 C.F.R. § 501.2(c).

## **LEGAL PRECEDENT**

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of a disease or condition for which compensation is claimed; (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

## **ANALYSIS**

Appellant alleged that she developed multiple chemical sensitivity due to exposure to a coworker's cologne in the performance of her federal job duties. She submitted medical reports from several physicians diagnosing multiple chemical sensitivities. Dr. Gordon, a Board-certified family practitioner, attributed appellant's multiple chemical sensitivity to her coworker's cologne. He referred appellant to Dr. Kilburn, Board-certified in preventive medicine, who noted appellant's history of exposure, reviewed her test results and diagnosed chemical encephalopathy due to cologne. Dr. Gordon stated that a causal connection between appellant's diagnosed condition and her employment exposure was likely as there was no neurological or psychiatric disease. In a report dated November 22, 2006, he noted that additional test results including a SPECT scan were consistent with a toxic chemical injury to the brain.

The Office referred appellant for a second opinion evaluation with Dr. Bruff, Board-certified in preventive medicine. Dr. Bruff determined that, based on his examination and review of the medical records, appellant did not have the altered anatomy or physiology necessary for the diagnosis of multiple chemical sensitivity.<sup>5</sup>

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<sup>2</sup> *Solomon Polen*, 51 ECAB 341, 343-44 (2000).

<sup>3</sup> 5 U.S.C. §§ 8101-8193, 8123.

<sup>4</sup> 20 C.F.R. § 10.321.

<sup>5</sup> It is not clear from the record that Dr. Bruff reviewed the results of the SPECT scan upon which Dr. Gordon relied in his November 2006 report.

The Board finds that there is an unresolved conflict of medical opinion evidence between Dr. Bruff who found that appellant had no medical condition as a result of her employment exposures and appellant's physicians Dr. Gordon and Dr. Kilburn who found as a result of diagnostic testing that appellant's condition was multiple chemical sensitivity or toxic encephalopathy which was due to her employment exposures. Due to the differing opinion between appellant's physicians and the Office second opinion physician, this case must be remanded for referral to an impartial medical specialist. On remand, the Office should refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician, to determine whether her diagnosed condition of multiple chemical sensitivity exists and is due to her accepted employment exposures.

**CONCLUSION**

The Board finds that the case is not in posture for decision and must be remanded for the Office to resolve the conflict of medical opinion evidence.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 24, 2007 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development with this decision of the Board.

Issued: August 14, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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