

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

D.C., Appellant)

and)

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Atlantic City, NJ,
Employer**)

**Docket No. 09-1070
Issued: November 12, 2009**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 16, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 2, 2009 merit decision terminating his compensation benefits. 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 on appeal is whether the Office properly terminated appellant's compensation benefits effective July 5, 2008.

FACTUAL HISTORY

On November 3, 2004 appellant, a 30-year-old federal air marshal, filed an occupational disease claim alleging that he sustained a collapsed lung (pneumothorax) as a result of his employment activities, which involved extensive flying. He also claimed that he suffered

employment-related headaches, stomach cramping, sinus problems, earaches, frequent colds and back pains. The Office accepted appellant's claim for spontaneous pneumothorax.

Appellant was treated by Dr. Joseph M. Feagan, a Board-certified osteopath, specializing in family medicine. On December 16, 2004 Dr. Feagan opined that appellant could return to full duty, provided that he was restricted from air flight. On January 4, 2005 he reiterated his restrictions. Dr. Feagan stated that repeated changes in air pressure associated with appellant's work-related travel accelerated the diagnosed pneumothorax. He explained that, in air travel, pressure falls, resulting in an increase in gas volume, and that any blebs in the lungs could be exacerbated by such pressure changes, leading to a pneumothorax. On June 14, 2005 Dr. Feagan stated that, although the symptoms associated with appellant's collapsed lung had resolved, the risk for recurrent pneumothorax continued to be an immediate threat in the context of his possible return to work as an air marshal.

In a report dated January 10, 2005, Dr. Amita Vasoya, a Board-certified osteopath, specializing in pulmonary medicine, reviewed the history of appellant's right pneumothorax, which he stated had since resolved. She opined that appellant could not fly on a daily basis, because continued flying would place him at risk for recurrence. On August 7, 2006 Dr. Vasoya again opined that appellant was unable to return to his date-of-injury position, which would require him to fly on a daily basis.

On March 16, 2007 the employing establishment notified appellant that he was being removed from his employment effective March 30, 2007 due to his inability to perform the duties of a federal air marshal. The employing establishment noted that his inability to perform those duties resulted from the accepted pneumothorax condition. Appellant filed a recurrence of total disability claim. On June 27, 2007 the Office accepted appellant's recurrence claim as of March 31, 2007.

On August 7, 2007 Dr. Vasoya again stated that appellant was unable to fly on a daily basis, due to his continued risk for recurrent pneumothorax. She opined that appellant could perform any job activity that did not involve flying.

The record reflects that appellant's position as an air marshal required flying on a regular basis. His duties consisted of protecting airline passengers and crews on passenger flights.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Brian Kim, a pulmonologist, for a second opinion examination and an opinion as to whether appellant continued to have residuals of his accepted pneumothorax and, if so, whether he was disabled as a result of those residuals. In a report dated February 20, 2008, Dr. Kim found appellant's chest clear to auscultation and percussion. He opined that appellant's accepted right pneumothorax had resolved. On April 2, 2008 Dr. Kim noted that a pulmonary function study revealed normal spirometry and lung volume. He stated that appellant's diffusing capacity was slightly reduced, as were his forced expiratory volume and forced vital capacity, compared to an October 11, 2006 study. Dr. Kim stated that appellant was still at risk of developing a spontaneous pneumothorax, especially if he worked under the condition of changing barometric pressures, such as working as a flight marshal. He explained the fact that appellant developed a spontaneous pneumothorax indicates that he has a tendency to develop a

pneumothorax at any time in the future. Dr. Kim opined that appellant was not capable of returning to full duty as an air marshal. In a supplemental report dated May 2, 2008, he indicated that appellant did not have any residual effect from the spontaneous pneumothorax, except for the danger of recurrence of a pneumothorax from certain conditions, such as daily flying or lifting heavy material, which would increase intrathoracic pressure. Dr. Kim stated that, as long as appellant avoided those conditions, the risk of a spontaneous pneumothorax was within normal range. He noted that the restriction to avoid daily flying was prophylactic in nature to avoid recurrence of a pneumothorax.

By notice dated May 9, 2008, the Office proposed to terminate appellant's compensation benefits, based upon Dr. Kim's report, which established that he no longer had residuals from his accepted pneumothorax condition. It also stated that any permanent restrictions were prophylactic in nature. In a decision dated June 12, 2008, the Office finalized its decision to terminate appellant's medical and wage-loss benefits effective July 5, 2008.

On June 17, 2008 appellant, through his representative, requested an oral hearing. At the October 28, 2008 hearing, counsel argued that appellant had residuals from his accepted condition, as evidenced by the fact that he was restricted from flying and was still under a doctor's care for breathing problems.

By decision dated January 2, 2009, the Office hearing representative affirmed the June 12, 2008 decision. The hearing representative found that appellant's restrictions related to flying were prophylactic and that his fear of future injury was not compensable.

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 The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

As used in the Federal Employees' Compensation Act,⁴ the term disability means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. The general test in determining loss of wage-earning capacity is whether the employment-caused impairment prevents the employee from engaging in the kind of work he was doing when he was

¹ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

² *J.M.*, 58 ECAB ____ (Docket No. 06-661, issued April 25, 2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

³ *T.P.*, 58 ECAB ____ (Docket No. 07-60, issued May 10, 2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁴ 5 U.S.C. §§ 8101-8193, 8102.

injured.⁵ In other words, if an employee is unable to perform the required duties of the job in which he was employed when injured, the employee is disabled.⁶

ANALYSIS

The evidence of record establishes that appellant is unable to perform the type of work he was performing when injured due to residuals of his accepted condition; therefore, he continues to be disabled under the Act.⁷ The Board finds that the Office improperly terminated appellant's compensation benefits as of July 5, 2008.

In the present case, the Office terminated appellant's compensation benefits after determining that his disability had ceased and that he no longer had residuals from his accepted pneumothorax. As used in the Act,⁸ the term disability means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. The general test in determining loss of wage-earning capacity is whether the employment-caused impairment prevents the employee from engaging in the kind of work he was doing when he was injured.⁹ In other words, if an employee is unable to perform the required duties of the job in which he was employed when injured, the employee is disabled.¹⁰

The evidence establishes that appellant is unable to perform the duties of an air marshal. There is no dispute that appellant no longer exhibited any symptoms related to his accepted pneumothorax as of July 5, 2008. However, there is also no disagreement that appellant should be restricted from flying on a regular basis due to his propensity to sustain a spontaneous pneumothorax. Dr. Feagan stated that, although the symptoms associated with appellant's accepted collapsed lung had resolved, the risk for recurrent pneumothorax continued to be an immediate threat in the context of his possible return to work as an air marshal. The Office's second opinion physician, Dr. Kim, stated that appellant was at continued risk of developing a spontaneous pneumothorax, especially if he worked under the condition of changing barometric pressures, such as working as a flight marshal. He explained the fact that appellant developed a spontaneous pneumothorax indicates that he has a tendency to develop a pneumothorax at any

⁵ See *Marvin T. Schwartz*, 48 ECAB 521 (1997). See also *Patricia A. Keller*, 45 ECAB 278, 286 (1993).

⁶ *Id.*

⁷ See *Prince E. Wallace*, 52 ECAB 357 (2001) (where claimant's physician opined that he was capable of resuming the duties of his date-of-injury job, but his recommended restrictions were in conflict with the requirements of the position, the Board found that he was disabled and reversed the Office's decision to terminate compensation benefits). See also *Marvin T. Schwartz*, *supra* note 5 (where the Office's second opinion physician opined that the claimant's accepted condition had resolved, but provided permanent lifting and bending restrictions which did not comport to the date-of-injury job description, the Board found that he was unable to perform the type of work he was performing when injured and was, therefore, disabled; the Board found that the Office had improperly terminated his compensation benefits).

⁸ 5 U.S.C. §§ 8101-8193, 8102.

⁹ See *Marvin T. Schwartz*, *supra* note 5. See also *Patricia A. Keller*, *supra* note 5.

¹⁰ *Id.*

time in the future. Dr. Kim opined that appellant was not capable of returning to full duty as an air marshal and should be restricted from daily flying or lifting heavy material, which would increase intrathoracic pressure. Compliance with Dr. Kim's restrictions would render appellant unable to perform the required duties of the job in which he was employed when injured and would thus, by definition, render him disabled.¹¹

Appellant's disability is, in itself, a residual of his accepted pneumothorax. If his employment-related condition had truly resolved, there would be no need to restrict appellant from flying. The Office hearing representative affirmed the termination decision finding that appellant's restrictions were prophylactic in nature. He likened this case to *Mary A. Geary*,¹² where the Board found that fear of future injury (psychological problems due to chemical exposure), which was related to an underlying nonemployment-related condition (ovarian cancer), was not compensable. The *Geary* case, however, is distinguished from the case at hand. In this case, the medical restrictions were designed to subvert an imminent threat of recurrence of a spontaneous pneumothorax due to an accepted employment-related condition. As Dr. Kim explained, the fact that appellant developed a spontaneous pneumothorax indicates that he has a tendency to develop a pneumothorax at any time in the future. As his restrictions are permanent, his condition is chronic in nature.

The evidence of record indicates that appellant is unable to perform the type of work he was performing when injured; therefore, he continues to be disabled.¹³ The Board finds that the Office improperly terminated appellant's compensation benefits as of July 5, 2008.

CONCLUSION

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits effective July 5, 2008.

¹¹ See *Jeri A. Holvick*, Docket No. 00-552 (issued August 27, 2001) (where claimant recovered from an accepted pulmonary condition but the referee physician opined that she could not return to work because of environmental pollutants, the Board found that the Office failed to meet its burden of proof because the claimant was not capable of performing the type of work performed when injured).

¹² 43 ECAB 300 (1991).

¹³ See *Prince E. Wallace*, 52 ECAB 357 (2001) (where claimant's physician opined that he was capable of resuming the duties of his date-of-injury job, but his recommended restrictions were in conflict with the requirements of the position, the Board found that he was disabled and reversed the Office's decision to terminate compensation benefits). See also *Marvin T. Schwartz*, *supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the January 2, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 12, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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