United States Department of Labor
Employees' Compensation Appeals Board

D.H., Appellant	)	
and	)	**Docket No. 09-2152**
	)	**Issued: July 20, 2010**
DEPARTMENT OF DEFENSE, DEFENSE INFORMATION SERVICES AGENCY, Denver, CO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 26, 2009 appellant filed a timely appeal from the March 19, 2009 decision of the Office of Workers' Compensation Programs terminating his compensation and medical benefits and the August 6, 2009 decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective December 19, 2008; and (2) whether the Office abused its discretion in denying appellant's request for reconsideration.

FACTUAL HISTORY

On May 1, 2004 appellant, then a 53-year-old information technology specialist, filed an occupational disease claim alleging that he sustained a pulmonary condition caused by working in cold temperatures beginning on August 12, 1984. He stopped work on February 19, 2004 and

returned to work on February 23, 2004. On March 6, 2007 the Office accepted an episode of acute cold air-induced asthma exacerbation, resolved.

On January 17, 2008 Dr. Mark A. Ebadi, an attending Board-certified specialist in allergy and immunology, noted that appellant had been under his care since 2004 for persistent asthma that was very difficult to control. He continued to experience daily chest tightness, nocturnal shortness of breath and cold-induced cough. None of the medications prescribed had been successful in controlling appellant's chronic and severe inflammatory disease. Dr. Ebadi recommended that he retire.

In a November 19, 2007 report, Dr. Karin A. Pacheco, a specialist in occupational and environmental medicine, reviewed the medical history and provided findings on physical examination and pulmonary test results. Appellant continued to experience shortness of breath, wheezing triggered by air conditioning and diesel fumes, voice changes and hoarseness in an air conditioned environment and lightheadness triggered by exposure to air conditioning or exposure to traffic. Dr. Pacheco recommended further asthma therapy and evaluation of possible obstructive sleep apnea and gastroesophageal reflux disease.

In reports dated July 10 and 11, 2008, Dr. Naomi M. Fieman, a Board-certified specialist in allergy and immunology and an Office referral physician, reviewed the medical history and provided findings on physical examination and the results of pulmonary testing. She diagnosed chronic asthma related to exposure to air conditioning. Dr. Fieman recommended further asthma treatment and avoidance of air conditioned environments.

By letter dated December 17, 2007, Dr. Pacheco advised the Office that appellant requested an addendum statement regarding her November 19, 2007 report. Appellant advised her that he no longer smoked but the report indicated that he reported smoking two to three cigarettes a day. On February 22, 2008 Dr. Pacheco advised that she now considered that appellant had reached maximum medical improvement based on a recent letter from Dr. Ebadi stating that he had maximized all treatment to control appellant's asthma.

On September 12, 2008 Dr. Ronald J. Swarsen, an Office medical adviser reviewed the medical history and opined that appellant's cold exposure at work was a temporary aggravation of his underlying asthma. Additionally, possible contributing factors of sleep apnea and gastroesophageal reflux disease and his 20-year history of smoking had not been adequately addressed by Dr. Pacheco and Dr. Fieman.

Due to the conflict in medical opinion between Dr. Pacheco and Dr. Fieman on one hand, and Dr. Swarsen on the other as to whether appellant had any residuals from her accepted aggravation of asthma, resolved, the Office referred appellant to Dr. Lawrence H. Repsher, a Board-certified internist specializing in pulmonary disease, who was provided with a statement of accepted facts, the case file and a list of questions. On October 23, 2008 Dr. Repsher reviewed the medical history and provided findings on physical examination and pulmonary test results. He noted that 14 years previously appellant began working in a "sick building" that had been contaminated by formaldehyde and other toxins. Because appellant's work area was not on the ground floor and temperatures could not be controlled at 77 degrees, apparently he had been classified as being absent without leave (AWOL) because he refused to enter the building.

Dr. Repsher noted that appellant filed an Equal Employment Opportunity (EEO) complaint and Americans with Disabilities Act (ADA) claims against the employing establishment. The settlements of the claims were apparently comprised of a telework agreement that he would continue to study for a safety consultant license and seek a job in private industry. As part of the agreement, appellant was authorized to use a government laptop computer but he could not obtain it from the employing establishment because a code needed to be installed over a 20- to 30-minute period in the server area. There were settlement agreements that precluded his entering that area because of the cold air.

Dr. Repsher opined that a methacholine challenge test (MCT) performed by Dr. Ebadi, which was interpreted as positive, was medically uninterpretable due to a gross lack of effort and cooperation with testing, strongly suggesting underlying malingering. He opined that the MCT performed for Dr. Pacheco was also medically invalid. Dr. Repsher noted that appellant was first diagnosed with bronchitis and asthma in 1992, beginning with pneumonia. He had symptoms of gastroesophageal reflux disease and obstructive sleep apnea but these conditions were not yet documented. On physical examination, appellant's vital signs were normal and he was in no apparent distress. His oxygen level was 98 percent. Chest breathing sounds were normal. The expiratory phase was not prolonged. There were no rales, rhonchi or wheezes even with forced expiration. Dr. Repsher noted that the MCT test was uninterpretable due to gross malingering. He opined that appellant had never experienced asthma or any other pulmonary or respiratory condition. Appellant was feigning his asthma symptoms and was deliberately uncooperative with pulmonary function testing. Dr. Repsher opined that appellant had always been fully fit to perform his regular work without restrictions. In the pulmonary test report prepared for Dr. Repsher, the technician noted that appellant experienced dyspnea, wheezing, lightheadness, dizzy spells and nasal congestion throughout the testing, exacerbated by the air conditioning. He was unable to perform spirometry or lung volume tests with any consistency, putting accuracy of the results in question and, consequently, the MCT test was not performed. Appellant advised that he did not feel well enough to perform the postbronchodilator spirometry test. He advised the technician that he put forth his best efforts during the testing.

By letter dated November 19, 2008, the Office advised appellant of its proposed termination of his wage-loss compensation and medical benefits on the grounds that the weight of the medical evidence, represented by the opinion of Dr. Repsher, established that he had no remaining disability or medical condition causally related to his February 19, 2004 aggravation of asthma.

On December 19, 2008 Office issued a final decision terminating appellant's wage-loss compensation and medical benefits.

Appellant requested reconsideration. In a December 17, 2008 report, Dr. Pacheco reviewed the medical history, provided findings on physical examination and noted the results of pulmonary tests. She commented on Dr. Repsher's report and reiterated her opinion that appellant had an asthma condition. Appellant was diagnosed with asthma at age 20 while serving in the military. His mother told him that he had asthma as a child. Dr. Pacheco noted that appellant's pulmonary function had begun to improve with asthma medication. By decision dated March 19, 2009, the Office affirmed the December 19, 2008 termination decision.

On May 27, 2009 appellant requested reconsideration. He contended that the report of Dr. Repsher was deficient factually and medically. By decision dated August 6, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence was not sufficient to warrant further merit review.[1]

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] It may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment.[5]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an episode of acute cold air-induced asthma exacerbation on February 19, 2004, resolved. Due to the conflict in medical opinion between Dr. Pacheco and Dr. Fieman versus Dr. Swarsen, the Office referred appellant to Dr. Repsher for an independent medical examination on the issue of whether appellant continued to have residuals of his asthma exacerbation.

Dr. Repsher reviewed the medical history and provided findings on physical examination and pulmonary test results. As part of the factual background, he noted that appellant was charged with being AWOL in the past because he refused to work at a building that had been contaminated by formaldehyde and other toxins. Dr. Repsher noted that appellant had filed EEO and ADA claims against the employing establishment. These events are not part of the statement of accepted facts or the September 30, 2008 medical conflict statement and October 15, 2008 addendum to the conflict statement. There is no relevance of these events to the issue Dr. Repsher was asked to resolve. Dr. Repsher opined that an MCT performed for Dr. Ebadi, which was interpreted as positive, was medically uninterpretable due to a gross lack of effort and cooperation with testing, strongly suggesting underlying malingering. However, he cited no statement from Dr. Ebadi or other evidence supporting his assertion. Dr. Repsher opined that the MCT performed for Dr. Pacheco was also medically invalid but did not explain his opinion or

[1] Subsequent to the August 6, 2009 Office decision additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

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

[3] *J.M.*, 58 ECAB 478 (2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

[4] *T.P.*, 58 ECAB 524 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

[5] *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

support it with any evidence. He noted that the MCT performed for him was uninterpretable due to gross malingering but did not explain. Further, Dr. Repsher's allegation is contradicted by comments by the pulmonary testing technician who noted that the MCT was not performed. The technician also noted that appellant experienced dyspnea, wheezing, lightheadness, dizzy spells and nasal congestion throughout the testing, exacerbated by the air conditioning. He was unable to perform spirometry or lung volume tests with any consistency, putting accuracy of the results in question and, consequently, the MCT test was not performed. Appellant advised that he did not feel well enough to perform the postbronchodilator spirometry test. He told the technician that he put forth his best efforts and the technician did not note any evidence that he was uncooperative. Dr. Repsher opined that appellant had never experienced asthma or any other pulmonary or respiratory condition. Appellant was feigning his asthma symptoms and was deliberately uncooperative with the pulmonary function testing. Dr. Repsher opined that appellant had always been capable of performing his regular work without restrictions.

The Board finds that Dr. Repsher's medical opinion is not sufficient to resolve the medical opinion conflict. Dr. Repsher included irrelevant information regarding conflicts with the employing establishment in the factual background. He identified malingering and intentional lack of cooperation by appellant without adequate explanation or support. There is a discrepancy between Dr. Repsher's allegation of gross malingering in the MCT results and the technician's statement that the MCT was not performed. Although the Office and all other physicians had accepted that appellant had an underlying asthma condition, Dr. Repsher opined that appellant had never had asthma. Dr. Repsher failed to provide adequate medical rationale explaining this opinion. In the brief two and one-half page narrative and analysis portion of his report, he did not provide sufficient medical rationale explaining the differences between his conclusions and appellant's previous medical history which includes examinations by several other physicians over the course of several years. For these reasons, Dr. Repsher's opinion regarding appellant's accepted asthma condition was not sufficient to resolve the conflict in medical opinion. The Office did not meet its burden of proof in terminating appellant's wage-loss compensation and medical benefits effective December 19, 2008 based on Dr. Repsher's opinion that he did not have an asthma condition or any other pulmonary or respiratory condition.

In light of the Board's resolution of the first issue, the second issue is moot.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof in terminating appellant's wage-loss compensation and medical benefits effective December 19, 2008.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 6 and March 19, 2009 are reversed.

Issued: July 20, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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