

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

D.D., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Baltimore, MD, Employer)

**Docket No. 11-1102
Issued: December 5, 2011**

Appearances:
Stephen Dunn, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 1, 2011 appellant, through her representative, filed a timely appeal from an October 22, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 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 OWCP met its burden of proof to terminate compensation for wage-loss and medical benefits effective April 11, 2010.

FACTUAL HISTORY

Appellant filed an occupational disease claim (Form CA-2) in January 1982 alleging that she sustained a pulmonary condition causally related to her federal employment as a letter

¹ 5 U.S.C. § 8101 *et seq.*

sorting machine operator. OWCP accepted the claim for temporary aggravation of bronchial asthma. Appellant stopped working in 1989 and began receiving compensation for wage loss.

OWCP referred appellant to Dr. Surjit Julka, a pulmonary specialist, for a second opinion examination regarding a continuing employment-related condition. In a report dated May 22, 2007, Dr. Julka provided a history and results on examination. He diagnosed bronchial asthma and responded to a question as to whether the diagnosis was employment related by answering “no.”

By decision dated July 2, 2007, OWCP terminated compensation for wage-loss and medical benefits. On July 30, 2007 appellant requested a hearing before OWCP’s hearing representative. She submitted a November 16, 2007 report from Dr. Jeffrey Gaber, an internist, who provided a history noting that she had a long history of asthma, including a hospitalization in 1973. According to Dr. Gaber appellant was “unable to take long walks, run or be exposed to a dusty environment and, therefore, is unable to resume full-time activity as an LSM operator. [Appellant] continues to suffer from the residual effects of the exposures that occurred at work which, in my opinion, are permanent in nature.”

By decision dated February 26, 2008, OWCP’s hearing representative vacated the July 2, 2007 decision. The hearing representative found that a conflict existed between Dr. Gaber and Dr. Julka, and the case was remanded for resolution of the conflict.

Appellant was referred to Dr. Jay Gerstenblith, a Board-certified pulmonary specialist, selected as a referee physician. In a report dated May 21, 2008, Dr. Gerstenblith opined that there was a strong possibility that the worsening of her condition was related to the work exposures. In a report dated June 23, 2008, he stated that it appeared appellant’s asthma was permanently aggravated by her workplace. Dr. Gerstenblith stated that her condition had apparently persisted for many years since stopping work and she continued to have recurrent episodes of bronchospasms at times of exposure. He further stated, “However, it is difficult to say whether the worsening of [appellant’s] condition could be related to her obesity and other medical problems. However, the reactive airways disease does appear to be playing a large role in her current disability.” Dr. Gerstenblith further stated that appellant’s asthmatic condition was considerably worse in the 10 years after her workplace exposure compared to the 10 years before workplace exposure and “How much of her condition currently is related to her morbid obesity as well as possibly related to her gastroesophageal reflux disease is difficult to determine.”

Further development of the medical evidence was undertaken as OWCP referred appellant for a second opinion examination by Dr. Natvarlal Rajpara, a pulmonary specialist. The questions posed to Dr. Rajpara concerned both a continuing employment-related condition as well as a permanent impairment. In a report dated September 24, 2008, Dr. Rajpara provided a history and results on examination. He diagnosed chronic persistent asthma and stated that the diagnosis was “not work injury by direct cause.” Dr. Rajpara stated that appellant’s disability was mostly based on morbid obesity, as mild asthma was not enough to make her disabled and she could work in a clerical job with a clean environment. In a supplemental report dated December 4, 2008, he stated that her asthma appeared to be well controlled. Dr. Rajpara stated that while appellant’s condition may have been aggravated by exposure to dust and smoke at

work, she was not currently exposed and such exposure was not contributing to any exacerbation. He concluded that a pulmonary impairment was not work related.

By decision dated December 17, 2008, OWCP determined that appellant was not entitled to a schedule award. Appellant requested a review of the written record and submitted a May 11, 2009 report from Dr. Gaber providing results on examination. Dr. Gaber opined that she had a permanent impairment due to exposure to dust and smoke at the employing establishment.

In a decision dated August 28, 2009, OWCP's hearing representative determined that there was a conflict in the medical evidence as to whether the employment-related aggravation of asthma had resolved. The hearing representative stated that this issue must be adjudicated before a decision as to a schedule award could be rendered, and the case was remanded for resolution of the conflict.

OWCP selected Dr. Raja Ayash, a Board-certified pulmonary specialist, as a referee physician. In a report dated November 9, 2009, Dr. Ayash provided a history and results on examination. The chest examination was reported as clear, with possible minimal wheezing on forced expiration. Dr. Ayash stated that appellant "suffers from bronchial asthma and, in my opinion, it is not work[-]related/occupational asthma, but it has been accepted so far that it is work[-]related aggravation of asthma and she has been out of work since 1991. If [appellant's] asthma is employment related, it would have ceased or resolved, but the patient continues to have symptoms of bronchial asthma and she is classified as moderately persistent asthma, as she has symptoms daily." Dr. Ayash noted that she did have asthma prior to her federal employment, and would probably have symptoms all her life that could be controlled with bronchodilator therapy. In a follow-up note dated December 28, 2009, he reviewed results on pulmonary function tests and an echocardiogram. Dr. Ayash stated that appellant's "symptoms were exacerbated during her employment but subsequently, she continued to have the same symptoms. If the patient has any impairment on the job, it is not related to her bronchial asthma, but could be related to her current weight, as she has a BMI [body mass index] of 51, with mild right heart dysfunction, as noted by echocardiogram." Dr. Ayash concluded that appellant could return to work and her employment-related aggravation had resolved.

In a letter dated February 24, 2010, OWCP notified appellant that it proposed to terminate her compensation for wage-loss and medical benefits. Appellant submitted a March 8, 2010 report from Dr. Gaber, who opined that she had a preexisting asthma that was permanently worsened as a result of exposure during federal employment. Dr. Gaber stated that it was not unusual for someone with asthma to have long-term problems even though no longer exposed, as irritants can cause permanent change to bronchial walls and set up an inflammatory process that never completely clears.

By decision dated April 2, 2010, OWCP terminated compensation for wage-loss and medical benefits effective April 11, 2010. It found the weight of the evidence was represented by Dr. Ayash.

Appellant requested a hearing before OWCP's hearing representative, which was held on August 4, 2010. By decision dated October 22, 2010, the hearing representative affirmed the April 2, 2010 termination decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.²

ANALYSIS

In the present case, OWCP terminated compensation for wage-loss and medical benefits effective April 11, 2010, finding the weight of the medical evidence was represented by Dr. Ayash, the physician selected as a referee physician under 5 U.S.C. § 8123(a).³ The accepted condition in this case was a temporary aggravation of asthma.

With respect to the issue of disability, when the accepted injury is a pulmonary condition based on environmental exposure in federal employment, there are additional considerations. As the Board has explained, if symptoms have subsided and there is a concern that renewed exposure to the environmental factors would cause a resumption of symptoms, there is no continuing employment-related disability.⁴ If the evidence shows there was a permanent change in the claimant's condition as a result of the federal employment exposure, such as a heightened sensitivity to wider field of allergens, then an employment-related disability may be established.⁵

OWCP did not provide a clear explanation of the issues regarding disability in this case to Dr. Ayash, and his reports do not demonstrate an understanding of the issues. Dr. Gerstenblith provided an opinion that appellant could "return to work." The basis for this opinion appeared to be his conclusion that the employment-related aggravation had resolved, but as to the opinion that the employment-related condition had resolved, Dr. Ayash failed to provide a rationalized medical opinion. Dr. Ayash initially stated that the underlying bronchial asthma was not employment related, but that was not the issue. OWCP accepted an aggravation, and it was not disputed that appellant had a preexisting asthma condition. Dr. Ayash then stated, "If her asthma was employment related, then it would have ceased or resolved..." It is not clear whether "her asthma" is referring to the accepted aggravation or the underlying condition. There is no explanation as to why, if he is referring to the accepted aggravation, it would have ceased or resolved. Dr. Ayash acknowledged that symptoms were aggravated by employment, and then stated that appellant "continued to have the same symptoms." The continuation of the same

² *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

³ FECA 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 the examination. 5 U.S.C. § 8123(a). The implementing regulations state 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 OWCP's medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

⁴ *See Gerald D. Alpaugh*, 31 ECAB 589 (1980).

⁵ *See James L. Hearn*, 29 ECAB 278, 287 (1978); *M.G. Docket No. 11-179* (issued September 7, 2011).

symptoms does not itself provide any explanation of why an employment-related aggravation would have ceased or resolved. On its face the continuation of symptoms would appear to support the opposite conclusion. If Dr. Ayash believed that there was no permanent change caused by employment exposure, and that at some specific point the employment-related aggravation resolved, he needed to clearly state this and provide supporting medical rationale for this opinion. The November 9 and December 28, 2009 reports do not provide a rationalized medical opinion.

It is OWCP's burden of proof to terminate compensation for wage-loss and medical benefits. There remains an unresolved conflict under 5 U.S.C. § 8123(a). As a result, the Board finds it did not meet its burden in this case.

CONCLUSION

The Board finds OWCP did not meet its burden of proof to terminated compensation for wage-loss and medical benefits effective April 11, 2010.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 22, 2010 is reversed.

Issued: December 5, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board