United States Department of Labor
Employees' Compensation Appeals Board

M.L., Appellant	)	
and	)	**Docket No. 10-1396**
	)	**Issued: February 2, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Spokane, WA, Employer	)	

Appearances:
Alan J. Shapiro, 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 April 27, 2010 appellant filed a timely appeal from a March 29, 2010 merit decision of the Office of Workers' Compensation Programs that affirmed the termination of 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 is whether the Office properly terminated appellant's compensation benefits effective October 6, 2009.

FACTUAL HISTORY

On March 3, 2008 appellant, then a 42-year-old claims clerk, filed an occupational disease claim alleging that his asthma was aggravated by a new carpet and renovations in his

work environment.[1] He stopped work on February 25, 2008, returned on March 4, 2008. Appellant stopped work again on March 17, 2008. The Office accepted his claim for temporary aggravation of preexisting asthma. Appellant received compensation.[2]

In a June 26, 2008 report, Dr. Jennifer Mayfield, a Board-certified family practitioner and treating physician reviewed appellant's history, which included that his breathing problems were exacerbated by working at the employing establishment in Building 32. She noted that appellant had ongoing pulmonary problems since August 2004. Dr. Mayfield advised that appellant needed to lose 30 to 50 pounds before undergoing a Nissen fundoplication. She diagnosed chronic asthma without mention of status asthmaticus, hiatal hernia, obstructive sleep apnea, morbid obesity and osteopenia due to chronic steroid use. Dr. Mayfield noted that appellant's condition was nearly static and opined that he was unlikely to experience major improvements in his ability to breathe in the next year. She opined that appellant would not able to return to work in the next year.[3]

In letters dated March 24 and April 7, 2009, the Office requested that Dr. Mayfield provide an update on appellant's condition. It also requested that she provide a rationalized opinion with regard to whether the work-related aggravation of his preexisting asthma was still active and causing symptoms despite his absence from the workplace for over a year. Dr. Mayfield did not respond.

On June 5, 2009 the Office referred appellant to Dr. Robert Cox, a Board-certified pulmonologist, for a second opinion. In a July 21, 2009 report, Dr. Cox noted appellant's history and medical treatment. He examined appellant for complaints of asthma and shortness of breath. The pulmonary examination revealed a normal breathing pattern at rest, normal chest inspection, and normal chest percussion. On auscultation, Dr. Cox determined that appellant had +1 expiratory wheeze, primarily heard over the anterior region of the throat. Appellant denied smoking except for a cigar "once in a while." Dr. Cox diagnosed persistent asthma solely based on appellant's self-report of symptoms throughout the day and repeated daily use of short-acting beta agonists and not on objective findings from a current pulmonary function study or physical examination.

Regarding vocal cord dysfunction, he noted that appellant was wheezing over the laryngeal area and, while this was nonspecific, he was suspicious as appellant exhibited poor asthma control in spite of an excellent medical regimen. Appellant was a possible smoker and exposed to high levels of second-hand smoke. Dr. Cox noted that appellant's urinary cotinine

[1] The record reflects that appellant has preexisting conditions which include: hiatal hernia, osteopenia, migraine, adjustment reaction with mixed emotion, hypertension, hyperlipidemia, allergies, diverticulitis (colonic), bipolar disorder, arthralgia, paresthesias, obesity, depressive disorder, esophageal reflux and asthma.

[2] The Office accepted appellant's claims for disability compensation for the periods February 8 to 25, 29, March 3 through 6, and March 7 through 13, 2008.

[3] On June 24, 2008 Dr. Lawrence Klock, a Board-certified pulmonologist and an Office referral physician, opined that appellant's asthma, which he had since age 26, was temporarily exacerbated by unspecified pathogens in Building 32 at work. He noted that no specific allergen or infectious agent had been isolated at work and that his opinion was based on a temporal relationship and the timing of appellant's symptoms.

levels were positive, which would either indicate active smoking of cigarettes or cigars or exposure to high levels of passive cigarette smoke. He explained that, if appellant was either exposed to active smoking or high levels of passive smoke, he would be susceptible to worsening of the underlying asthma condition. Dr. Cox advised that appellant's current asthma was not related to any temporary aggravation of his preexisting condition from his work environment. Appellant had been completely out of the work environment for over a year and his symptoms continued unabated. Dr. Cox explained that there was no report of any toxic substance in the work space that would account for this duration of symptoms and removal from the workplace should have resulted in improvement if there was anything in the work environment that was causing temporary aggravation. Appellant was not currently disabled from employment as a result of the temporary aggravation of his preexisting asthma or due to his current asthma status. Dr. Cox noted that appellant's current pulmonary function was only mildly reduced in spite of self-reported extreme symptoms. He concluded that appellant did not currently have any work-related condition. Dr. Cox advised that there was no medical reason that appellant could not work at a sedentary job in an office setting and that he had no current disability due to the accepted aggravation of his condition. He completed a work capacity evaluation on July 23, 2009 which included restrictions on exposure to temperature extremes, airborne particles and gas or fumes.

On September 4, 2009 the Office issued a notice of proposed termination of compensation. It noted that the weight of medical evidence was represented by the report of Dr. Cox. It established that appellant's temporary aggravation of his preexisting asthma had ceased and he no longer had any disability or residuals due to the accepted condition.

In an October 6, 2009 decision, the Office terminated appellant's compensation benefits effective that date. It found that the weight of medical evidence rested with Dr. Cox and supported that appellant no longer had residuals of the accepted work-related aggravation.

On October 14, 2009 appellant's representative requested a telephonic hearing, which was held on January 13, 2010. During the hearing, appellant advised that he had a 60 percent military service-connected disability for asthma.

In a letter dated October 27, 2009, appellant's representative provided the Office with employing establishment treatment records. In a September 18, 2009 report, Dr. James McHugh, a Board-certified family practitioner and employing establishment physician, addressed appellant's history. He noted findings and diagnosed various conditions including hiatal hernia, osteopenia, asthma and morbid obesity. In a September 21, 2009 pulmonary function report, Dr. McHugh diagnosed moderately severe obstructive airway disease.

A July 21, 2009 chest x-ray was read by Dr. Alice B. Josafat, a Board-certified radiologist, who noted appellant had a clinical history of asbestos exposure. Dr. Josafat indicated that there were no acute consolidations in the lungs and no radiographic evidence for asbestos exposure.

By decision dated March 29, 2010, an Office hearing representative affirmed the October 6, 2009 termination decision.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[4] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[5]

ANALYSIS

The Office accepted that appellant sustained temporary aggravation of preexisting asthma.

On March 24 and April 7, 2009 the Office requested that appellant's treating physician provide an updated opinion regarding his disability status. When Dr. Mayfield did not respond, the Office referred appellant for a second opinion examination with Dr. Cox.[6]

The Board finds that Dr. Cox's opinion is well rationalized and represents the weight of the medical evidence regarding appellant's accepted conditions.

Dr. Cox examined appellant and explained that the pulmonary examination revealed a normal breathing pattern at rest, normal chest inspection and normal chest percussion. He diagnosed persistent asthma based on appellant's self-reported symptoms but noted it was not confirmed by his review of diagnostic testing or findings on examination. While appellant demonstrated vocal cord dysfunction and wheezing over the laryngeal area, this was a nonspecific finding. Dr. Cox noted that appellant exhibited poor asthma control in spite of an excellent medical regimen. He determined that appellant was a possible smoker or exposed to high levels of second-hand smoke based on positive urinary nicotine levels. Dr. Cox explained that, if appellant was exposed to active smoking of high levels or to passive smoke, he would be susceptible to worsening of his underlying asthma condition. He opined that appellant's current asthma was not related to the accepted temporary aggravation of his preexisting condition from his work environment. Appellant had been out of the work environment for over a year but his symptoms continued unabated. Dr. Cox advised that there was no report of any specific toxic agent in the work space that would account for this duration of symptoms. He noted that appellant's long absence from the workplace should have resulted in improvement if there was anything in the work environment that was causing temporary aggravation. Dr. Cox found that appellant was not currently disabled from employment as a result of any temporary aggravation of his preexisting asthma or due to his current status. Appellant's current pulmonary function studies were only mildly reduced in spite of self-reported extreme symptoms. There was no medical reason that appellant could not return to work in a sedentary environment in an office setting. Dr. Cox completed a work capacity evaluation which included restrictions on exposure

[4] *Curtis Hall*, 45 ECAB 316 (1994).

[5] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[6] *See* 20 C.F.R. § 10.320.

to temperature extremes, airborne particles and gas or fumes. He concluded that appellant did not have residuals from the employment injury. Furthermore, Dr. Cox did not attribute any inability to work to the accepted employment exposure or conditions.

The Board notes that appellant submitted employing establishment treatment records, including a September 18, 2009 report and a September 21, 2009 pulmonary function report, from Dr. McHugh. The pulmonary function study merely provided a diagnosis of moderately severe obstructive airway disease. Dr. McHugh did not offer any opinion addressing how this was related to appellant's accepted exposure in 2008. The July 29, 2009 chest x-ray from Dr. Josafat did not provide an opinion on the issue of whether appellant continued to have any employment-related condition. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[7]

The Board finds that the weight of medical opinion is represented by Dr. Cox. He found that appellant no longer had residuals or disability related to his accepted employment exposure and the Office properly terminated appellant's compensation benefits effective October 6, 2009. The Office's decision to terminate appellant's compensation benefits shall be affirmed.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective October 6, 2009.

[7] *S.E.*, 60 ECAB ___ (Docket No. 08-2214, issued May 6, 2009); *Michael E. Smith*, 50 ECAB 313 (1999).

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2010 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: February 2, 2011
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