United States Department of Labor
Employees' Compensation Appeals Board

K.H., Appellant	)	
and	)	**Docket No. 10-965**
	)	**Issued: January 10, 2011**
DEPARTMENT OF THE ARMY, LETTERKENNY ARMY DEPOT, Chambersburg, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 23, 2010 appellant, through his attorney, filed a timely appeal from a January 20, 2010 merit decision of the Office of Workers' Compensation Programs. 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 established that he was entitled to continuation of pay from April 7 through 30, 2009.

FACTUAL HISTORY

On April 10, 2009 appellant, a 57-year-old purchasing agent, filed a traumatic injury claim (Form CA-1) for asthma and headaches he sustained on April 6, 2009 when he was exposed to an "overwhelming odor/smell" in his workplace. A witness statement from a coworker noted an odor that made his eyes water. Appellant was taken by ambulance to

Chambersburg Hospital from work on April 6, 2009. He submitted additional statements, describing the April 6, 2009 incident.[1]

On April 6, 2009 Dr. Ryan Shelly, an osteopathic emergency room physician, obtained a history of injury that appellant "smelled odd smells" at work that day, which gave him a headache. Appellant had long-term problems with smells causing headaches. Dr. Shelly listed findings on examination and diagnosed acute headache. He excused appellant from work April 6, 2009 and advised that appellant could return to full-duty work on April 7, 2009, without restrictions.

In an undated note Dr. Bricker excused appellant from work April 7 through 30, 2009. He attributed appellant's absence to a work-related illness, headaches and asthma.

On April 13, 2009 Dr. James E. Bruckart, Board-certified in family medicine, reviewed appellant's history of injury.

By report (Form CA-17) dated April 27, 2009, Dr. Bricker diagnosed occupational asthma and headache, secondary to fume exposure. By checkmark, he advised that appellant could not perform his regular job and provided restrictions prohibiting him from being exposed to fumes, dust, chemicals and solvents. Dr. Bricker defined the period of disability as April 6, 2009 to "undetermined."

On April 17, 2009 the Office inquired as to whether appellant sought a traumatic injury or have the incident considered under a previously filed occupational disease claim.[2] Appellant stated that he would have to think about the matter. He had not returned to work since the April 6, 2009 employment incident. Appellant alleged repeatedly experiencing headaches and difficulty breathing and that the aroma which triggered his symptoms kept reappearing. He alleged that the employing establishment changed his duty station several times but he was still exposed to the odor. Appellant alleged that his physician advised him that he may need to find another job.

By letter dated April 28, 2009, appellant requested that his claim be adjudicated as an occupational disease claim (Form CA-2). He attributed his condition to four years of exposure to carcinogens, carbon monoxide, solvents, soaps, smoke, chemical fumes and olfactory triggers in a building without proper ventilation.

[1] In a supplemental statement, appellant explained that he had experienced a series of episodes at work beginning on August 9, 2006, during which he was overcome by fumes. He stated that he had filed claims for each episode and that two claims had been accepted for asthma and headaches. Appellant submitted to the record a number of medical reports which predate the April 6, 2009 incident. On January 20, 2009 Dr. Johny Allencherry, a Board-certified internist, reported that a pulmonary function test revealed small airway disease with a significant reversible bronchospasm and mildly decreased oxygenation. On February 13 2009 Dr. Stanton E. Sollenberger, a Board-certified neurologist, noted that appellant's symptoms could be evidence of neurotoxicities associated with exposure to substances or fumes at work. He reported that appellant experienced hoarseness in his voice and progressive hearing loss. Dr. Sollenberger also noted that his workstation had been changed because of these conditions. On March 2, 2009 Dr. Samuel Q. Bricker, who is Board-certified in family medicine, excused appellant from work March 2 and 3, 2009, because of "occupational headaches and asthma."

[2] Office claim File No. xxxxxx820. By decision dated May 12, 2009, this claim was denied.

On May 6, 2009 Dr. Bruckart diagnosed occupational asthma and headaches which he attributed to exposure to fumes.

By decision dated May 22, 2009, the Office denied the claim. It found that the evidence of record did not establish that appellant's condition was caused by the April 6, 2009 incident. It acknowledged receipt of his April 28, 2009 letter but did not adjudicate the claim as an occupational disease that would create duplicate claims for the same condition.

On June 8, 2009 appellant, through his attorney, requested an oral hearing.

On July 9, 2009 Dr. Sollenberger reviewed appellant's history of injury and course of treatment. He opined that appellant may have a type of reflexive epilepsy.

On July 23, 2009 an Office hearing representative vacated the May 22, 2009 decision and remanded the case to the Office for acceptance of appellant's claim for headache and coverage of medical benefits for the April 6, 2009 incident. The hearing representative noted that the medical evidence of record did not establish that appellant was disabled from work beyond April 6, 2009.

By decision dated August 17, 2009, the Office accepted appellant's claim for acute headache. After noting the findings of the Office hearing representative, it accepted the headache he sustained on April 6, 2009.

In an August 17, 2009 decision, the Office also denied appellant's claim for continuation of pay commencing April 6, 2009. It found that the evidence of record did not establish that he was disabled from work beyond April 6, 2009.

On September 2, 2009 appellant, through his attorney, requested an oral hearing, which the Office conducted on December 3, 2009. Appellant testified concerning his, working conditions and medical history. Counsel argued that appellant lost work due to occupational asthma as well as headaches. He further argued that the medical evidence of record established that these conditions were causally related to the accepted April 6, 2009 incident. Appellant stated that he tried to return to work on April 30, 2009, but his employer told him it could not accommodate his medical issues.

On September 2, 2009 Dr. Sollenberger stated that he was "fairly confident" that appellant had an unusual form of reflex epilepsy. He explained that the trigger for appellant's atonic seizures was an olfactory trigger. Dr. Sollenberger noted that the first time appellant experienced these seizures was at work. Since that date, appellant had experienced seizures in nonwork environments as well. On October 11, 2009 Dr. Sollenberger reported that an electroencephalogram (EEG) produced normal results. It was a nondiagnostic study because appellant did not experience a headache.

In progress notes from Dr. Thomas W. Furlow dated February 24 to June 29, 2009, appellant was seen for essential and other forms of tremor and migraines without mention of intractable migraine triggered by fumes/scents. He advised that appellant was cleared to return to work on April, 9, 2009 as his headache had improved and his voice had strengthened.

By decision dated January 20, 2010, an Office hearing representative affirmed the August 17, 2009 decision denying continuation of pay (COP).

LEGAL PRECEDENT

Section 8118 of the Federal Employees' Compensation Act[3] provides for payment of COP, not to exceed 45 days, to an employee who has filed a claim for a period of wage loss due to traumatic injury with his immediate supervisor on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title. Section 8122(a)(2)[4] provides that written notice of injury must be given as specified in section 8119. The latter section provides in part that notice of injury shall be given in writing within 30 days after the injury.[5]

The Office's regulations clarify that COP is payable for a maximum of 45 calendar days, however time lost on the day or shift of the injury does not count toward COP.[6] The agency must keep the employee in a pay status for that period.

In order to establish entitlement to continuation of pay, an employee must establish, on the basis of reliable, probative and substantial evidence, that he was disabled as a result of a traumatic employment injury. As part of this burden, he must furnish medical evidence from a qualified physician who, based on a complete and accurate history, concludes that the employee's disability for specific periods was causally related to such injury.[7] As used in the Act, the term disability means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury.[8] 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.[9]

ANALYSIS

The Office accepted that on April 6, 2009, appellant sustained an acute headache. It found that he was not entitled to continuation of pay from April 7 through 30, 2009 because the medical evidence of record failed to establish he was disabled due to his accepted acute

[3] 5 U.S.C. §§ 8101-8193.

[4] *Id*. at § 8122(a)(2)

[5] *Id.* at § 8119(a)(c). *See also Gwen Cohen-Wise*, 54 ECAB 732 (2003).

[6] 20 C.F.R. § 10.215(a).

[7] *Carol A. Dixon*, 43 ECAB 1065 (1992); *Virginia Mary Dunkle*, 34 ECAB 1310 (1983). *See Carol A. Lyles*, 57 ECAB 265 (2005); 20 C.F.R. § 10.205(a) (to be eligible for continuation of pay, a person must: (1) have a traumatic injury which is job related and the cause of the disability, and/or the cause of lost time due to the need for medical examination and treatment; (2) file Form CA-1 within 30 days of the date of the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury).

[8] *Marvin T. Schwartz*, 48 ECAB 521 (1997).

[9] *Id.*

headache. The Board finds that appellant has not submitted sufficient medical evidence[10] to establish that he was disabled from April 7 through 30, 2009 due to his accepted employment injury.[11]

Appellant was initially examined on April 6, 2009 at the Chambersburg Hospital by Dr. Shelly who diagnosed an acute headache and released appellant to return to work on April 7, 2009.

Dr. Bricker excused appellant from work April 7 through 30, 2009 and defined the period of disability as April 6, 2009 to "undetermined." He attributed appellant's absence from work during this period to work-related illness, headaches and asthma, but his reports are of diminished probative value. Dr. Bricker did not discuss the issue of disability with reference to the accepted April 6, 2009 employment incident. By checkmark, he noted that appellant could not perform his regular job and provided restrictions prohibiting him from being exposed to fumes, dust, chemicals and solvents as of April 7, 2009. It is well established that form reports addressing causal relationship with a checkmark are of limited probative value in the absence of any medical rationale explaining the physician's opinion.[12] Dr. Bricker's reports do not establish appellant's disability from April 7 through 30, 2009 due to accepted April 6, 2009 headache.

Dr. Bruckart also diagnosed occupational asthma and headaches which he attributed to appellant's exposure to fumes. He did not provide a history detailing appellant's employment exposure to fumes on April 6, 2009 or explain how any exposure on the date in question would cause asthma or attribute to chronic headaches. Furthermore Dr. Bruckart offered no explanation as to how the diagnosed conditions rendered appellant totally disabled from work from April 7 through 30, 2009.

Dr. Furlow treated appellant for headaches from February 24 to June 29, 2009. His progress notes however did not obtain any history regarding appellant's accepted incident of April 6, 2009. Dr. Furlow's opinion regarding appellant's disability status during the period in question is therefore of limited probative value. It does not establish that appellant's disability was causally related to the April 6, 2009 exposure at work.

Dr. Sollenberger stated that he was "fairly confident" that appellant may have an unusual form of reflex epilepsy. He noted that appellant's symptoms could be evidence of neurotoxicities associated with exposure to substances or fumes at work. Dr. Sollenberger did

[10] Dr. Allencherry's report has no probative value because it concerned a period of disability predating that at issue here. Additionally, the unsigned reports and notes have no probative value as they cannot be identified as having been prepared by a physician. *See R.M.*, 59 ECAB 690 (2008); *Richard Williams*, 55 ECAB 343 (2004).

[11] The Board notes that the record contained several newspaper articles and an article published on the internet concerning appellant's wine-making hobby and recently opened vineyard. Such material has no evidentiary value as it is irrelevant and, moreover, not determinative of whether appellant's alleged total disability was causally related to the accepted employment injury. *See Gaetan F. Valenza*, 35 ECAB 763 (1984); *Kenneth S. Vansick*, 31 ECAB 1132 (1980) (newspaper clippings, medical texts and excerpts from publications are of general application and not determinative of whether the specific condition claimed was causally related to the particular employment injury involved).

[12] *Alberta S. Williamson,* 47 ECAB 569 (1996).

not identify the nature of the substance or fumes on April 6, 2009. Appellant's use of the phrase "fairly confident," renders Dr. Sollenberger's opinion as speculative and of diminished probative value.[13] Dr. Sollenberger did not explain how the accepted employment injury rendered appellant totally disabled from work during the relevant period here. For these reasons, his reports do not establish appellant's entitlement to continuation of pay from April 6 through 30, 2009.

CONCLUSION

The Board finds that appellant has not established he was entitled to continuation of pay from April 7 through 30, 2009.

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 2011
Washington, DC

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

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

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

[13] *See L.R. (E.R.)*, 58 ECAB 369 (2007).