

medical problems, including respiratory difficulties and extreme fatigue, which she had not previously experienced. Despite moving to the second floor of the building in 1993, water also leaked into this work space on several occasions and her symptoms worsened.¹

In a March 24, 1992 report, the employing establishment reported the results of environmental testing carried out in the basement of Building B. It was noted that 13 out of 14 employees who worked in the basement reported poor air quality in the work space, including excessive heat, odors and lack of air circulation and complained of respiratory symptoms. Testing for formaldehyde showed results well below the permissible exposure limit of one part per million (ppm) and concentrations of carbon dioxide were generally between 500 and 800 ppm. Concentrations of carbon dioxide exceeded 800 ppm on several occasions and, although these results fell within the range where complaints typically occurred, they were below levels associated with widespread complaints. It was recommended that outdoor ventilation be increased, existing carpets be removed and replaced and areas which contributed to the flooding of the office be patched.²

In a December 17, 1997 report, Dr. Frank W. Gruber, an attending Board-certified emergency medicine physician, diagnosed multiple chemical sensitivities and severe environmental allergies. These conditions were associated with debilitating headaches, shortness of breath, inability to think clearly, muscular weakness (especially in her neck) and emotional lability. Dr. Gruber found that appellant was totally disabled from work.

Environmental testing of appellant's work space from early 1998 showed that carbon dioxide levels were within acceptable levels and that the ventilation systems were functioning appropriately to provide fresh air. Air sample results were below the applicable exposure limits for formaldehyde, heptane, toluene, petroleum distillates and acetone. No visible growth of molds/fungi was observed in any area where appellant worked.³ It was noted that Basidiospore, Penicillium and Aspergillus strains of fungi/mold were identified in appellant's office on the second floor of Building B.⁴

Appellant stopped work in September 1998 and did not return. In January 1999, the Office accepted that she sustained the condition of multiple chemical sensitivities. Appellant received compensation for periods of disability.

In a March 22, 1999 report, Dr. Gerald H. Ross, an attending Board-certified environmental medicine physician, stated that intradermal testing from January 1998 confirmed

¹ Appellant indicated that after December 1992 she still had to visit her supervisor in the basement of Building B on occasion.

² The presence of a musty odor was noted and it was reported that water still leaked into the work space on rainy days.

³ In the basement of Building B, visible growth was found after removing vinyl baseboard material.

⁴ The report from March 17, 1998 indicated that a total of 5560 spores of fungi/mold per cubic meter of air (including Cladosporium spores) were found in Building A. Several fungi, including Stachybotrys, were found in the basement of Building B. Appellant indicated that she had to work for a period in Building A while Building B was being renovated and that she periodically visited the basement of Building B.

that appellant had chemical sensitivities to mold, cigarette smoke, formaldehyde, cologne and orrisroot (an aromatic substance found in many cosmetics). Her symptoms included shortness of breath, thirst, aching and weakness in her shoulders, emotional instability and difficulty with concentration and memory. Dr. Ross stated that a single photon emission computerized tomography scan obtained in January 1999 showed normal results, but asserted that appellant underwent a “less accurate” form of this test and therefore the results did not rule out neurotoxicity. He was unable to predict a date for release to unrestricted employment. In several subsequent reports, Dr. Ross found appellant totally disabled since September 1998 due to work-related toxic encephalopathy.

In an April 12, 1999 report, Dr. John Ellis, a Board-certified occupational medicine physician who served as an Office referral physician, noted that appellant reported complaints such as headaches, fatigue, shoulder discomfort, marked intolerance to odors, shortness of breath, forgetfulness, confusion, disorientation, loss of balance and emotional instability. On physical examination, he noted normal findings. Dr. Ellis discussed the condition of multiple chemical sensitivities and questioned whether appellant had such a condition. He saw little justification for the diagnoses and disability findings of Dr. Ross or Dr. Gruber and posited that appellant’s allergies could not be reliably ascribed to her work.⁵

The Office determined that there was a conflict in the medical opinion between Dr. Ellis and appellant’s attending physicians regarding her continuing work-related disability. It referred her to Dr. John C. Schaefer, a Board-certified internist specializing in infectious diseases, for an impartial medical evaluation and opinion on the matter.

In a September 1, 1999 report, Dr. Schaefer deferred making a diagnosis and recommended testing for hypersensitivity pneumonitis. He was currently unable to explain why appellant would continue to experience work-related residuals. In a supplemental report dated September 22, 1999, Dr. Schaefer stated that the hypersensitivity pneumonitis evaluation he obtained found positive antibodies to several fungi, including *Aureobasidium Pullulans*, *Cladosporium Herbarium*, *Penicillium Notatum* and *Trichoderma Viride*. In addition, there were antibodies to animal protein (including beef and pork), mixed feathers and pigeon droppings. He noted that depression needed to be ruled out.

The Office determined that additional evaluation was needed of appellant’s pulmonary condition. On October 10, 2000 Dr. Eldridge H. Derring, Jr., a Board-certified pulmonologist who served as an Office referral physician, reported the findings of pulmonary testing he obtained. He concluded that appellant did not have any significant measurable respiratory impairment, except for very mild restrictive changes which might be associated with body habitus. Pulmonary function tests from October 9, 2000 showed normal expiratory flow rates and very mild reduction in total lung capacity (4.36 liters or 78 percent). Dr. Derring recommended that appellant not be exposed to areas of air pollution or mold and posited that her respiratory status was stable.

⁵ Dr. Ellis noted that a psychiatric evaluation from January 1999 showed depression and indicated that “this should be explored.”

Dr. Ernest Bernhardt, Jr., an attending osteopath and Board-certified surgeon, first examined appellant on January 15, 2001. He noted that she complained of headaches, tension, severe muscle weakness of the legs, shoulders and neck, and impaired memory and inability to concentrate. Appellant stated that the symptoms began while working in Norfolk in 1992 and were thought to be the result of molds, mildew, chemical fumes, cleaning products, fragrances or other environmental allergens. Dr. Bernhardt described the results of his physical examination and diagnosed environmental illness and somatic dysfunction of her sacroiliac, lumbar, thoracic, cervical, sternoclavicular and cranial areas.

In April 2004 the Office referred appellant for a second opinion examination by a Board-certified pulmonary specialist, Dr. Elizabeth Ann Raitz-Cowboy. In an April 23, 2004 report, Dr. Raitz-Cowboy stated that appellant reported that she was in perfect health until around 1992 when she moved into a new work setting in Norfolk. She was seen by allergists, some of whom told her she had allergies and some of whom told her she did not. Appellant indicated that the allergists provided a large amount of antibiotics and she followed up with Dr. Gruber, a herbalist and homeopathic physician who was also her boyfriend. Dr. Raitz-Cowboy noted that appellant had complained that her nurses were wearing perfume when she walked into the office, but stated that no one in the office wore cologne or perfumes as a matter of policy. Appellant also complained of muscle fatigue and exhaustion and claimed that Dr. Raitz-Cowboy's office must have mold in it.

Dr. Raitz-Cowboy reviewed appellant's prior medical records and described the contents of various reports, including those of Dr. Ellis, Dr. Bernhardt, Dr. Schaefer and Dr. Derring. A laboratory analysis from January 1998 was normal except for slightly increased magnesium and selenium levels and pointed out that Dr. Schaefer stated that there was no organic basis for appellant's complaints. Dr. Raitz-Cowboy described in detail the results of her physical examination of appellant and indicated that pulmonary function testing performed was "absolutely within normal limits" and that a chest x-ray was also completely within normal limits. She did not see any signs of multiple chemical sensitivities and saw nothing to support the diagnosis of toxic encephalopathy, noting that all heavy metal levels were negative. Dr. Raitz-Cowboy also found no evidence that appellant suffered from any credible medical or pulmonary abnormality, noting the completely normal pulmonary function testing performed on April 23, 2004 and the normal chest x-ray. Dr. Raitz-Cowboy stated that there was one discussion of perhaps a mild restrictive disease on a set of breathing tests from October 2000 but contrasted these findings with the more recently obtained normal test findings. She did not have a copy of the flow loops to state whether or not the tests from 2000 were done by exact American Thoracic Society (ATS) standards and noted that the testing performed on April 23, 2004 met all ATS criteria. Dr. Raitz-Cowboy was concerned that appellant described the physician/herbalist who was treating her as a "significant other" which may have altered his ability to clearly and objectively evaluate her situation. She opined that appellant was able to work a full eight hours a day without any restrictions and found no organic problem.

In a May 19, 2004 letter, the Office advised appellant that it proposed to terminate her entitlement to compensation benefits on the basis that the weight of the medical evidence established that she no longer had any residuals or disability due to her work injury. The Office cited the opinion of Dr. Raitz-Cowboy as the basis for the proposal and provided her 30 days to submit additional evidence and argument challenging the proposed action.

In an undated statement received on June 11, 2004, appellant objected to the proposal to terminate her compensation benefits. She claimed that there were a number of factual inaccuracies in the report of Dr. Raitz-Cowboy and indicated that Dr. Gruber was not a herbalist and that her relationship with him was purely professional. Appellant claimed that Dr. Raitz-Cowboy did not do any allergy testing and asserted that the day she saw Dr. Raitz-Cowboy was a good day for her.

In a July 28, 2004 decision, the Office terminated appellant's compensation benefits, effective July 11, 2004. It cited the opinion of Dr. Raitz-Cowboy as the basis for this decision.

Additional medical evidence was submitted, including the office notes of Dr. Bernhardt for the period October 2002 to March 2005. The records noted that appellant was treated on multiple occasions for complaints of headaches, anxiety, dizziness, and pain in her neck, upper back, lower back and both shoulders. Dr. Bernhardt stated that his treatment included gentle osteopathic manipulation of the spinal, clavicular and cranial areas.

In a November 9, 2004 report, Dr. Allan Lieberman, an attending physician Board-certified in occupational and environmental medicine, indicated that he had reviewed the report from Dr. Raitz-Cowboy. He stated that she did not review the environmental analysis performed by the employing establishment "whose findings justified their moving the whole department from the basement location to what they thought was a safer working environment." Dr. Lieberman noted that appellant was but one of 13 workers with complaints consistent with dampness and mold injury. He asserted that Dr. Raitz-Cowboy failed to recognize the concern of the engineers about the constant flooding of the basement that saturated the carpets. Dr. Lieberman noted that specific testing with the individual molds identified in the environmental analysis provoked many of the symptoms complained about by appellant. He opined that appellant was injured on the job by chronic exposure to dampness and mold and stated that the sequelae of her injury were still present. Dr. Lieberman indicated that there was a clear temporal relationship between the exposures and the onset of appellant's injury, there was a strong association with 12 other workers being affected and there were no other alternative explanations to explain the injuries to 13 out of 14 people working in the damp, moldy basement.

Appellant requested a hearing before an Office hearing representative. At the April 19, 2005 hearing, appellant indicated that even after she moved out of the basement office of Building B in December 1992, she continued to experience various symptoms. She began treatment with Dr. Gruber in 1994 and asserted that he was not an herbalist and that she had no personal relationship with him. Appellant had good days and bad days and her reactions were caused by exposure to all types of substances, including dry cleaning chemicals and new carpeting. Her reactions included severe pain in both shoulders, severe headaches, loss of memory, confusion and breathing difficulties. Appellant testified that she was having a good day when she saw Dr. Raitz-Cowboy and that she only spent about a half hour with Dr. Raitz-Cowboy before she was sent to the hospital for pulmonary testing. Appellant's counsel stated that she had known appellant since she moved to Norfolk in 1990 and that appellant's relationship with Dr. Gruber was strictly professional.

In a June 16, 2005 decision, the Office affirmed the July 28, 2004 decision terminating appellant's compensation effective July 11, 2004.

On August 13, 2005 appellant requested reconsideration of her claim. She submitted an October 11, 2005 report in which Dr. Lieberman stated that she reported multiple organ and system dysfunction including upper respiratory symptoms of rhinitis, pharyngitis and sinusitis, fatigue to somnolence, headaches, anosmia, hypersensitivity pneumonitis and signs and symptoms of neurotoxicity. He indicated that all of these conditions were capable of being caused by exposure to dampness and indoor mold. Dr. Lieberman noted that he undertook single blind allergy testing performed as provocative challenges and found that appellant reacted objectively by wheezing and subjectively with symptoms to *Aspergillus*, *Cladosporium* and *Stachybotrys*, all molds identified in her workplaces. He diagnosed work-related multiple chemical sensitivities and stated:

“The exposure dose was adequate to cause the injuries. The level of mold found varied between 160-5560 [spores per cubic meters of air]. There are no official standards at this time for indoor airborne fungi concentrations. However indoor fungal levels about a range of 150-1000 colony forming units per cubic meter of air ... are considered to be sufficient to cause human health problems. Additionally, 40 spores [per cubic meter of air] of *Stachybotrys* were identified in the basement of building B. This mycotoxin-producing mold is usually not airborne so the findings of 40 is very significant and indicates the presence of a reservoir in the working facility.

“The history of medical records indicates that the manifestations of the injuries persist. The onset of her injuries began after the exposures to dampness and mold indicating a true cause and effect relationship.

“There is a strong degree of association with 13 of 14 employees also being symptomatic.... There are no other reasonable causes to explain this workers injury.”

In a June 21, 2006 decision, the Office affirmed the June 16, 2005 decision finding that the October 11, 2005 report of Dr. Lieberman was of limited probative value.

In a November 21, 2006 letter, appellant requested reconsideration of her claim. She asserted that the report of Dr. Raitz-Cowboy was not sufficiently well rationalized to support the Office’s termination of compensation. In a November 14, 2006 letter, Dr. Lieberman again expressed his disagreement with the opinion of Dr. Raitz-Cowboy.

In a March 20, 2007 decision, the Office affirmed the June 21, 2006 decision.

In a June 26, 2007 letter, appellant requested reconsideration of her claim and reiterated that the reports of Dr. Lieberman supported her claim.

In a May 16, 2008 decision, the Office affirmed its March 20, 2007 decision. In a May 14, 2009 letter, appellant requested reconsideration of her claim and provided further argument regarding why she felt the medical evidence of record showed that she still had work-related residuals. In an August 12, 2009 decision, the Office affirmed the May 16, 2008 decision.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,⁶ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁷ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁸ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.¹⁰

Section 8123(a) of the Act provides in pertinent part: "If there is 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 an examination."¹¹ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.¹²

ANALYSIS

Appellant stopped work in September 1998 and the Office accepted that she sustained the condition of multiple chemical sensitivities. She claimed that exposure to various allergens in the workplace since 1991 had caused her condition and environmental studies confirmed the existence of potential allergens, including molds such as Basidiospore, Penicillium and Aspergillus. The Office paid compensation for total disability, but terminated appellant's compensation effective July 11, 2004 based on the opinion of Dr. Raitz-Cowboy, a Board-certified pulmonary specialist who served as an Office referral physician.

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁸ *Id.*

⁹ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹⁰ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

¹¹ 5 U.S.C. § 8123(a).

¹² *William C. Bush*, 40 ECAB 1064, 1075 (1989).

The Board finds that the well-rationalized April 23, 2004 report of Dr. Raitz-Cowboy established that appellant ceased to have residuals of her accepted condition effective July 11, 2004 and the Office met its burden of proof to terminate her compensation.¹³

In her April 23, 2004 report, Dr. Raitz-Cowboy described in detail the results of her physical examination of appellant and indicated that pulmonary function testing performed was within normal limits and that a chest x-ray was also within normal limits. She did not see any signs of multiple chemical sensitivities or anything to support the diagnosis of toxic encephalopathy, noting that all heavy metal levels were negative. Dr. Raitz-Cowboy stated that there was one discussion of perhaps a mild restrictive disease on a set of breathing tests from October 2000 but noted that even these limited results were not reproduced in the more current test results.

The Board has carefully reviewed the opinion of Dr. Raitz-Cowboy and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Raitz-Cowboy's opinion provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Raitz-Cowboy provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing, and reached conclusions regarding appellant's condition which comported with this analysis.¹⁴ Dr. Raitz-Cowboy provided medical rationale for her opinion by explaining that the findings on physical examination and diagnostic testing did not show any evidence of the existence of a continuing work-related multiple chemical sensitivities condition.¹⁵

For these reasons, the April 23, 2004 report of Dr. Raitz-Cowboy justified the termination of appellant's compensation and the Office properly terminated her compensation effective July 11, 2004. After this proper termination by the Office, the burden of proof shifted to appellant to establish entitlement to compensation after July 11, 2004.

¹³ On appeal, appellant argued that the reports of Dr. Ellis, an occupational medicine specialist, and Dr. Derring, a pulmonologist, were too old to justify the termination of her compensation. However, the Office did not base its termination of appellant's compensation effective July 11, 2004 on the reports of these physicians. Appellant also argued that the Office should have interpreted the opinion of Dr. Schaefer, an internist specializing in infectious diseases who served as an impartial medical specialist in 1999, to show that she continued to have work-related residuals. Dr. Schaefer indicated that a hypersensitivity pneumonitis evaluation from 1999 showed positive antibodies to several fungi and other allergens, but he did not provide any opinion regarding whether appellant continued to have residuals of her accepted multiple chemical sensitivities condition. At the time of the referral to Dr. Raitz-Cowboy, there was no conflict in the medical evidence regarding whether appellant continued to have residuals of her accepted condition.

¹⁴ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

¹⁵ Appellant claimed that Dr. Raitz-Cowboy mischaracterized Dr. Gruber, an attending emergency medicine physician, as an herbalist who had a personal relationship with her. The Board notes that, even though it has not been shown that Dr. Gruber was an herbalist or had a personal relationship with appellant, Dr. Raitz-Cowboy reported that appellant provided these facts to her during the history portion of the April 2004 examination. Dr. Raitz-Cowboy's opinion that appellant ceased to have work-related residuals was based on the findings on examination and diagnostic testing rather than on the nature of Dr. Gruber's practice or his relationship with appellant. On appeal, appellant asserted that Dr. Raitz-Cowboy did not adequately assess her "biomarkers," but she did not adequately explain this assertion and her opinion on medical matters would not have probative value.

After the termination of her compensation, appellant submitted November 9, 2004 and October 11, 2005 reports of Dr. Lieberman, an attending physician Board-certified in occupational and environmental medicine. The Board notes that Dr. Lieberman provided an opinion that appellant continued to have residuals of the accepted condition of multiple chemical sensitivities after July 11, 2004. His reports create a conflict in the medical opinion with that of Dr. Raitz-Cowboy.

In reports of November 9, 2004 and October 11, 2005, Dr. Lieberman noted that specific testing with the individual molds identified in the environmental analyses of appellant's workplace provoked many of the signs and symptoms complained about by appellant. He opined that appellant was injured on the job by chronic exposure to dampness and mold and stated that the sequelae of her injury were still present as manifested by multiple chemical sensitivities. Dr. Lieberman indicated that there was a clear temporal relationship between the exposures and the onset of appellant's injury, there was a strong association with 12 other workers being affected and there were no other alternative explanations to explain the injuries to 13 out of 14 people working in the damp, moldy basement. He posited that the allergens that appellant was exposed to in the workplace were adequate to cause her to suffer from the accepted multiple chemical sensitivities condition after July 11, 2004.¹⁶ Dr. Lieberman asserted that Dr. Raitz-Cowboy failed to adequately address these matters.

The Board finds there is a conflict in the medical opinion between Dr. Raitz-Cowboy and Dr. Lieberman. The case shall be remanded for referral to an impartial medical specialist for an examination and opinion regarding whether appellant continued to have residuals of the accepted multiple chemical sensitivities condition after July 11, 2004. After such development as the Office deems necessary, it shall issue an appropriate decision on appellant's claim.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective July 11, 2004 on the grounds that she had no residuals of her accepted employment injury after that date. After this proper termination, a conflict in the medical opinion was created regarding whether appellant had work-related residuals after July 11, 2004 and the case is remanded to the Office for further development.

¹⁶ Dr. Lieberman stated that the level of mold found varied between 160-5560 spores per cubic meters of air, a level sufficient to cause long-term health problems.

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2009 decision of Office of Workers' Compensation Programs is affirmed, as modified, to find that the Office met its burden to terminate appellant's compensation effective July 11, 2004. There is a conflict in the medical evidence regarding continuing work-related residuals after July 11, 2004. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: March 3, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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