United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 10-1694**
	)	**Issued: May 23, 2011**
DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, UT, Employer	)	

Appearances:
David J. Holdsworth, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On June 14, 2010 appellant filed a timely appeal from the March 23, 2010 merit decision of the Office of Workers' Compensation Programs denying his claim for compensation. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant met his burden of proof to establish that he was disabled during the periods October 15 to November 13, 2006 and December 26, 2006 to March 3, 2007 as a result of his employment-related condition.

FACTUAL HISTORY

On October 22, 2002 appellant, then a 36-year-old electrical equipment repairman, filed a traumatic injury claim for headaches and nausea. During the week of October 15, 2002 the burn

[1] 5 U.S.C. § 8101 *et seq.*

off oven leaked smoke and sent chemical fumes into the air which caused him to feel light headed.[2] On March 25, 2003 appellant was placed in a term position as a laborer in a different building from where the injury took place. He continued this laborer position until September 7, 2003 when he was placed in a term detail as a clerk. Appellant returned to his position as an electrical equipment repairer on January 4, 2004 and worked until February 22, 2004, when he voluntarily accepted a position as a supply technician. On April 16, 2006 he accepted a position as a management and program assistant in an office setting.

On April 13, 2006 appellant claimed a recurrence of disability citing lack of concentration, headache, shortness of breath and fatigue. He related his condition to his work on July 1, 2003 when he had a general decline in overall health and the recurrence of asthma. Appellant stopped work on November 9, 2005. The Office developed the claim as a new occupational disease. On October 10, 2006 it accepted the claim for extrinsic asthma. Appellant worked approximately three to four hours a day with restrictions. He retired from the Federal Government effective May 24, 2008.

On November 13, 2006 appellant filed a claim for 91 hours of intermittent wage loss for the period October 15 to November 13, 2006. In a November 20, 2006 letter, the Office advised him that the case record lacked objective medical evidence addressing how the claimed disability was related to his accepted condition.

The Office received a July 28, 2006 work status evaluation from a registered nurse indicating that appellant was released to work half days with permanent restrictions from chemical exposure. In a November 27, 2006 work status evaluation, Dr. Douglas Fuller, Board-certified in occupational medicine, indicated "physician release from work [October 31 to November 21, 2005] and as needed from [January to December] 2006."

In a December 13, 2006 report, Dr. Casey L. Stelter, a Board-certified family practitioner, noted that appellant had been diagnosed with polymyositis and was being followed in a rheumatology clinic. Pulmonary testing from September 28, 2006 was consistent with a mild restrictive and obstructive pattern. Dr. Stelter noted that appellant was under a pulmonologist's care for the past year for lung disease. He opined it was plausible that appellant's pulmonary dysfunction was due to his workplace exposure. Dr. Stelter noted that appellant was working half days due to his condition and that he was placed on work restrictions by his pulmonologist in July 2006. He stated that appellant would need time off for exacerbations and medical visits.

By decision dated December 22, 2006, the Office denied appellant's claim for wage loss from October 15 to November 13, 2006.

[2] This was filed under claim number xxxxxx563 which has been doubled with the claim that is before the Board. Claim number xxxxxxx563, was not initially developed by the Office which administratively paid medical bills up to $1,500.00. The Office accepted that appellant was exposed to increased levels of carbon monoxide and carbon dioxide. It also found that he may have been exposed to alipathic naptha, xylenes, n-butyl acetate, acetone, isopropanal and toluene as these substance were noted in June 5, 2003 testing that occurred about three months after his duty station changed.

Appellant submitted medical evidence, including a January 31, 2007 chest x-ray. In a January 30, 2007 report, Dr. Fuller stated that appellant presented with reactive airway disease, hypertension, fatigue, typical polymyositis (type 1), asthma extrinsic and polymyositis in other collagen vascular disease. He released appellant to work without limitations.

Reports were also received from Dr. Gary J. Alexander, a pulmonologist. In a January 31, 2007 report, Dr. Alexander noted an impression of asthma with worsening symptoms while, in a January 31, 2007 work capacity evaluation, he advised that appellant could only work three to four hours daily due to extrinsic asthma. In a March 19, 2007 report, he stated that appellant had been diagnosed with polymyositis and had symptoms of asthma/reactive airways disease. Dr. Alexander described the chemicals appellant was exposed to at work and opined that the work exposure caused appellant's symptoms as he had no symptoms before his exposure. He stated that appellant worked half time because of his medical condition from March 2006 to January 30, 2007 and restricted him to working only three to four hours a day from January 31, 2007 to the present. Dr. Alexander advised that there may be days when appellant missed work due to his lung disease. He further opined that, due to the chemical exposure at work, the duration of appellant's illness would depend on how his body healed.

Appellant subsequently filed a claim for compensation for 268 intermittent hours of wage loss for the period December 26, 2006 to March 3, 2007. The Office advised him, in a March 16, 2007 letter, that the record lacked sufficient medical evidence to support disability for the period claimed and informed him of the evidence needed to support his disability claim.

To clarify appellant's disability status, the Office referred him to Dr. William T. Sadler, a Board-certified pulmonologist, for a second opinion. Dr. Sadler examined appellant on March 13, 2007. In an April 3, 2007 report, he noted the history of injury, his review of the medical record and findings on examination. Dr. Sadler indicated that, while appellant was no longer exposed to carbon monoxide, his asthma persisted and a neurologist would be better able to determine whether there were lingering effects of carbon monoxide exposure. He opined that, assuming appellant had no more exposure to airborne chemicals, he could return to work as an electrician. However, Dr. Sadler stated that significant unresolved questions remained with respect to whether he had poliomyelitis, the etiology of his fatigue and whether his lifting restriction would preclude his work as an electrician. The Office sent additional questions to Dr. Sadler on March 30, 2007 along with authorization to perform diagnostic testing necessary to answer the questions set forth. However, Dr. Sadler never responded to the Office's request.

In an April 26, 2007 report, Dr. Alexander confirmed appellant's polymyositis diagnosis and that he continued to be symptomatic from asthma. He indicated that appellant's most recent chest x-ray was January 31, 2007 and pulmonary function testing was October 24, 2006. Dr. Alexander stated that appellant's condition would wax and wane in its severity from a respiratory standpoint and that his lung disease was expected to be persistent and long term. He stated that he was not aware of any nonwork factors or exposures that might be aggravating appellant's condition and opined his lung disease was not worsening because of his current job.

By decision dated May 24, 2007, the Office denied modification of the December 22, 2006 decision.

In a September 4, 2007 progress report, Dr. Alexander stated that appellant was in no acute distress and that his lungs were clear without wheezes, rhonchi or crackles.

In September 5 and 6, 2007 reports, Dr. Jamilé S. Woods, a Board-certified pulmonologist and Office referral physician, indicated that further testing was necessary before she could respond to the Office's questions on appellant's disability status. Additional testing took place on September 17, 2007 and included a methacholine challenge test and cardiopulmonary exercise testing. In an October 11, 2007 addendum, Dr. Woods indicated that both the methacholine challenge test and cardiopulmonary exercise test were unreliable due to appellant's lack of cooperation. She concluded that appellant's dyspnea was of unknown etiology. On November 5, 2007 the Office asked Dr. Alexander to comment on Dr. Woods report. No response was received from Dr. Alexander.

In a January 9, 2008 decision, the Office denied appellant's claim for intermittent wage-loss compensation from December 26, 2006 through March 3, 2007.

On January 11, 2008 appellant's attorney requested reconsideration of the Office's decisions denying appellant's wage-loss claims for the periods October 15 through November 13, 2006 and December 26, 2006 to March 3, 2007.

In a January 3, 2008 report, Dr. Alexander stated that he treated appellant for shortness of breath and difficulty breathing which were severe and limited his ability to perform daily activities. He opined that appellant's symptoms were related to exposures that occurred at the workplace. Dr. Alexander also noted that appellant had significant symptoms of muscle inflammation. He stated that appellant was limited in his ability to work due to his symptoms. Dr. Alexander stated on many occasions, appellant was only able to work three to four hours a day and, at other times, he was unable to work at all. Additional treatment notes from him were submitted along with a January 23, 2008 functional capacity evaluation

In a January 29, 2008 report, Dr. Richard E. Kanner, a Board-certified pulmonologist, diagnosed anxiety attacks, possible neuromusculoskeletal disorder and possible asthma.

In two separate March 12, 2008 decisions, the Office denied appellant's request for reconsideration of its January 9, 2008 decision and it denied modification of its May 24, 2007 decision.

On March 12, 2009 appellant's attorney requested reconsideration from the two March 12, 2008 decisions denying wage loss. In a March 13, 2009 letter, he argued that the claim should be accepted for additional diagnosed conditions. Counsel further argued that the evidence reflected that appellant should be compensated for all periods for which he has been unable to work, namely, from October 15, 2006 to May 26, 2007 and ongoing. He outlined several actions that took place regarding appellant's claim between January 9 and March 12, 2008. A copy of a March 10, 2009 chest x-ray report was submitted along with additional medical evidence. In a March 10, 2009 report, Dr. Alexander opined that appellant was disabled because of shortness of breath, asthma and chronic pain. On March 12, 2009 he opined that appellant was disabled from his respiratory symptoms, which were precipitated from exposure at his workplace and significant myalgias with muscle twitching and a severe rash.

In a March 13, 2009 report, Dr. Michael R. Martineau, a Board-certified dermatologist, stated that appellant had been under his care for a hypersensitivity reaction over the past few months and had a documented history of significant chemical exposure. He noted the results of a biopsy and patch testing and stated that the distribution and characteristics of the lesions were consistent with an internal hypersensitivity reaction which he opined was caused by appellant's history of chemical exposure. Dr. Martineau advised that other etiologies were unlikely.

In an April 22, 2009 report, Dr. Daniel Hendricks, a chiropractor, noted that appellant believed his muscle spasm and inflammation in his neck and mid and low back were the result of toxic exposure from his work. He stated that he treated appellant since 2003 and that his muscle spasm and tension had increased over the years with less relief from treatment.

A June 30, 2008 report from Layton Family Medicine indicated that appellant had increasing asthma problems for about three weeks and noted a new puppy in the home.[3] Medical reports from Dr. Douglas L. Powell, a Board-certified dermatologist, dated February 18, 20, 23 and 25, 2009 pertain to a rash on appellant's legs. Dr. Powell diagnosed dermatitis in his February 25, 2009 report. He indicated in his February 23, 2009 report that patch testing was done and there was no objective data to prove that the rash was caused by his workplace environment.

By decision dated June 15, 2009, the Office denied modification of its previous decisions denying wage-loss compensation from October 15 to November 13, 2006 and December 26, 2006 to March 3, 2007.[4]

On January 18, 2010 appellant requested reconsideration. In a January 16, 2010 statement, his attorney requested that the Office expand the scope of the accepted conditions and approve intermittent wage loss. Counsel also requested that the Office refer appellant to a toxicologist. A March 10, 2009 chest x-ray report and a November 16, 2009 computerized tomography scan of the chest were submitted along with additional medical reports.

In an August 11, 2009 report, Dr. Milan Djurich, a Board-certified physiatrist and pain specialist, reviewed the medical record and set forth his examination findings. He opined that, while he was not a toxicologist, appellant sustained injuries far beyond his lung tissues as a result of his work-related chemical exposure, which rendered him unable to work. Dr. Djurich recommended appellant be evaluated by an industrial toxicologist.

In an August 26, 2009 report, Dr. Alexander stated that appellant was exposed to a number of chemicals in his workplace and developed asthma, a rash and severe arthralgias that became debilitating. An impression of shortness of breath, asthma and chronic pain were provided. Dr. Alexander opined that appellant was disabled because of his current symptoms.

[3] The signature on the report is illegible and, thus, it is unclear whether a physician rendered the report.

[4] In a June 16, 2009 letter, the Office addressed several points which appellant raised in his reconsideration request.

By decision dated March 23, 2010, the Office denied modification of its previous decisions.[5]

LEGAL PRECEDENT

The term disability as used in the Act means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.[6] Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[7] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[8] The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employee's to self-certify their disability and entitlement to compensation.[9]

ANALYSIS

The Office accepted that appellant sustained extrinsic asthma due to factors of his federal employment. The record reflects appellant was removed from the source of his exposure on March 25, 2003 when he was moved to a different building. There is no indication that he was reexposed to the source of his initial exposure from March 25, 2003 until he retired effective May 24, 2008. In 2006, appellant claimed compensation for intermittent wage loss for the periods October 15 to November 13, 2006 and December 26, 2006 to March 3, 2007. The Office denied his claims finding that the medical evidence did not establish his disability for the periods claimed. The Board finds that appellant has not provided sufficient medical evidence to establish his claim.

In a March 19, 2007 report, Dr. Alexander stated that appellant worked half time because of his medical condition from March 2006 to January 30, 2007. He also indicated in a January 31, 2007 work capacity evaluation and a March 19, 2007 report, that appellant was restricted to working only three to four hours a day as of January 31, 2007 because of his extrinsic asthma. The Board finds that Dr. Alexander did not provide sufficient medical reasoning to explain why appellant was unable to work for the specific periods at issue due to the accepted extrinsic asthma condition or why he was restricted to working only three to four hours

[5] The Office advised that a separate decision would be issued with regard to the issue of expanding the scope of the accepted conditions.

[6] *Paul E. Thams*, 56 ECAB 503 (2005). *See* 20 C.F.R. § 10.5(f).

[7] *Paul E. Thams, id.*; *W.D.*, Docket No. 09-658 (issued October 22, 2009).

[8] *Id.*

[9] *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

a day as of January 31, 2007.[10] While Dr. Alexander noted that there may be days when appellant missed work due to his lung disease, he did not provide sufficient explanation in support of appellant's disability for the claimed periods whether it corresponded to the dates appellant claimed or how appellant's accepted extrinsic asthma caused disability in 2006 or 2007 after workplace exposure ended in March 2003.

In an April 26, 2007 report, Dr. Alexander advised that he was not aware of any factors or exposures, either work or nonwork related, that might be aggravating appellant's condition. He provided no explanation as to why appellant's respiratory condition would wax and wane in its severity so as to partially or totally disable him during the claimed period and why any disability would be due to appellant's employment. Dr. Alexander stated in his January 3, 2008 report that appellant's symptoms limited his ability to work; but provided no medical reasoning to explain why appellant was unable to work for the specific periods at issue due to his accepted condition. He generally supported a causal relationship between appellant's exposure to workplace chemicals and the development of a rash and arthralgias; but the Office has not accepted these conditions as employment related. Furthermore, Dr. Alexander did not sufficiently address why appellant was unable to work for specific periods claimed or how any diagnosed condition or symptom was caused or aggravated by the accepted condition or work factors. No other reports from him specifically attributed any period of disability to the accepted condition. Dr. Alexander did not offer adequate medical reasoning in support of the periods of disability claimed.

In his November 27, 2006 work status evaluation, Dr. Fuller released appellant from work as needed from January to December 2006. However, he did not specifically attribute any period of disability to the accepted condition or offer a medical explanation why appellant would need to be released from work due to the accepted condition. Furthermore, Dr. Fuller released appellant to work without limitations on January 30, 2007.

Dr. Stelter opined it was plausible that appellant's pulmonary dysfunction was due to his workplace exposure. In his December 13, 2006 report, he stated that appellant would require time off for exacerbations and follow-up visits with his providers. However, the record does not show that any of the time claimed during the claimed periods were for medical visits. Additionally, Dr. Stelter did not specifically attribute any period of disability to the accepted condition or offer a reasoned medical explanation as to why particular workplace exposures caused any disability during the claimed periods.

While Dr. Djurich opined that appellant sustained injuries far beyond his lung tissues as a result of his work-related chemical exposure which caused disability, he did not specifically attribute any period of disability to the accepted extrinsic asthma or otherwise explain the reasons why appellant's workplace exposure caused disability during the claimed period.

The reports from Dr. Kanner, Dr. Martineau and Dr. Powell are insufficient to establish appellant's claim as they offered no opinion on disability during the claimed period. The other medical evidence of record, such as diagnostic testing, is of no probative value as it does not offer an opinion on disability during the claimed period. The Office also received an April 22,

[10] *Deborah L. Beatty*, 54 ECAB 340 (2003).

2009 report from Dr. Hendricks, a chiropractor. A chiropractor is considered a physician for purposes of the Act only where he diagnoses and treats a spinal subluxation shown by x-ray.[11] As Dr. Hendricks did not diagnose a spinal subluxation based on an x-ray, he is not a physician under the Act and his reports do not constitute probative medical evidence. Likewise, records from other nonphysicians, such as nurses, are insufficient to establish the claim.[12]

As the medical evidence provides insufficient reasoning to establish that appellant's claimed disability is related to his accepted extrinsic asthma, appellant has not met his burden of proof to establish his claim.

CONCLUSION

The Board finds that appellant did not establish disability for work for the periods claimed.

[11] 5 U.S.C. § 8101(2) provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[12] *See* 5 U.S.C. § 8101(2). *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated March 23, 2010 is affirmed.

Issued: May 23, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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