

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

M.P., Appellant)
and) Docket No. 10-1900
DEPARTMENT OF VETERANS AFFAIRS,) Issued: May 17, 2011
VETERANS ADMINISTRATION MEDICAL)
CENTER, Cincinnati, OH, 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, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 13, 2010 appellant filed a timely appeal from the June 1, 2010 merit decision of the Office of Workers' Compensation Programs denying her claim for periods of disability. Pursuant to the Federal Employees' Compensation Act¹ 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 appellant established that she sustained work-related disability for intermittent periods between January 7 and March 4, 2009.

FACTUAL HISTORY

On October 14, 2008 appellant, then a 51-year-old housekeeping aid, filed an occupational disease claim alleging that she sustained a respiratory condition due to her work

¹ 5 U.S.C. § 8101 *et seq.*

environment. She started working in the paper shredder room in January 2008 and began to experience a cough and chest congestion. At first, appellant experienced these symptoms about once a month, but by March or April 2008 she was being treated for respiratory infections every three weeks.

On October 14, 2008 appellant was released to work by her attending physicians with restrictions from exposure to paper dust from shredding or cleaning solutions and on November 8, 2008 she was released to work without restrictions.

In a November 18, 2008 report, Dr. William L. Eschenbacher, an attending Board-certified pulmonologist, who worked for the employing establishment, recommended that appellant limit her exposure to irritant materials, such as paper shredding and strong cleaning products. He was not certain that she had asthma, but noted that it appeared from her history of symptoms resulting from her exposure to paper shredding areas that paper dust was irritating her and causing her symptoms of cough, shortness of breath and chest tightness. Dr. Eschenbacher posited that the same could be said of appellant's exposure to cleaning products. Appellant had stated that if a given cleaning product was mild she did not have the same problem.

In an April 9, 2009 decision, the Office accepted that appellant sustained work-related general allergic rhinitis. It prepared a statement of accepted facts (SOAF) dated April 9, 2009, which noted that she started at the employing establishment in September 2007 and that from then until January 2008 she was assigned duties which involved the use of common cleaning agents to clean work areas. The SOAF stated that appellant's smoking history included using cigarettes since she was a teenager at a rate of about one pack a day. Her duties since January 2008 involved shredding paper with 30 percent of the work consisting of collecting paper products and 70 percent of the work consisting of shredding the collected paper products in a room with an open door and an operating fan.

On June 1, 2009 appellant filed a claim for wage-loss compensation (Form CA-7) alleging leave buyback and leave without pay for the period September 25 to November 7, 2008. She filed another Form CA-7 on October 22, 2009 claiming leave without pay and a leave buyback for the period October 7, 2008 to March 4, 2009. The Office compensated appellant for the 8 hours of leave without pay she claimed on October 10, 2008 and for the 64 hours of the leave buyback she claimed from September 25 to November 7, 2008.

The Office referred appellant to Dr. Jonathan Bernstein, a Board-certified allergist, for a second opinion evaluation. In an August 20, 2009 report, Dr. Bernstein discussed her history of work exposure and reported the findings of his July 28, 2009 examination. Appellant reported that she had been smoking about two packs of cigarettes a day for 35 years but now was down to half a pack a day. Dr. Bernstein stated that she denied trouble with exposure to cleaning materials, but reported that she missed over 300 hours during the prior year due to her exposure in the shredding room. He noted that appellant had stage 1 breast cancer in remission, stage 2 melanoma, hypertension and high cholesterol and reported that her peak expiratory flow was 420, a result which showed that her lung flow was not significantly diminished. Dr. Bernstein indicated that her records were not helpful in determining whether she had asthma versus chronic obstructive lung disease from smoking that was irritated by dust exposure. He recommended spirometry, before and after bronchodilators, to be followed by a methacholine challenge test to

assess her airway hyperresponsiveness, which was a central indicator of asthma. Dr. Bernstein also recommended skin testing for allergies.

Dr. Bernstein arranged for the recommended testing on August 31, 2009. In a September 3, 2009 report, he noted when he saw appellant in July 2009 her physical examination was essentially unremarkable. Dr. Bernstein advised that her skin patch testing for seasonal and year-round allergens was negative and that her methacholine challenge test was significantly positive for airway hyperresponsiveness. He stated that appellant's overall baseline lung function test was not consistent with chronic obstructive lung disease even though she was a heavy smoker. Dr. Bernstein opined that her findings were consistent with asthma and recommended that she cease smoking as this activity affected her overall lung function. He recommended that she avoid the paper shredding room as dusty situations could trigger her underlying asthma.

In a September 11, 2009 report, Dr. Eschenbacher stated that he had seen appellant on two occasions for her lung disease -- October 8 and 29, 2008. Appellant had been diagnosed with asthma with symptoms that were worsened by exposures in the workplace, especially while shredding paper. Dr. Eschenbacher noted that her outside methacholine challenge test revealed increased bronchial responsiveness consistent with the diagnosis of asthma. He stated that appellant was "ill with respiratory problems due to her asthma" on October 7 and 31 and November 4 to 7, 2008, January 7, 27, 28 and 29 and March 4, 2009.

Dr. Bernstein provided a supplemental report dated October 15, 2009 noting that appellant's evaluation did not reveal allergic rhinitis but rather showed nonallergic rhinitis, a condition which was typically triggered by irritants such as dust, chemicals or weather changes. He stated that it was unclear from her history whether she had these problems prior to working in the shredding room, but it was likely that her nonallergic rhinitis was aggravated by her workplace exposures. Regarding the question regarding residuals, Dr. Bernstein stated that appellant had essentially improved since being removed from the shredding room and noted that she had not complained of symptoms since she avoided this environment. He stated that her smoking would continue to aggravate her condition.

The Office compensated appellant for leave buyback from October 29 to November 5, 2009. In an October 27, 2009 letter, it advised her that additional evidence was needed to support her claim for intermittent periods of disability between January 7 and March 4, 2009. The Office requested that appellant submit the requested evidence within 30 days of the day of the letter.

In a January 21, 2010 decision, the Office denied appellant's claim for 33.5 hours of wage loss for the period January 7 to March 4, 2009. It noted that she had been advised in an October 27, 2009 letter that medical evidence to support her inability to work for this period was needed. The Office found that appellant did not submit medical documentation to support the period of disability.

Appellant requested a telephonic hearing before an Office hearing representative. At the April 7, 2010 hearing, she testified that during the period January 7 to March 4, 2009 she was out of work on an intermittent basis. Appellant would get respiratory infections which had rapid

onsets. She testified that she was in a recovery mode and was out of the paper shredding room during this period, but her breathing was not back to normal. Appellant engaged in cleaning duties during this period and several of the cleaners aggravated her condition. She advised that she did not go to a physician each time she was off work during the period January 7 to March 4, 2009. Appellant testified that she saw Dr. Eschenbacher on a sporadic basis and did not see him every time she had symptoms. During the period in question she quit smoking, but acknowledged that she still smokes about a half a pack a day. Counsel contended that the practice of medicine did not permit a patient like appellant to see a physician every time she had a respiratory problem. He suggested that the Office had the burden to show that her problems during the period in question were not work related.

In a June 1, 2010 decision, the Office hearing representative affirmed the January 21, 2010 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Act² has the burden of establishing the essential elements of his or her claim including the fact that the individual is an “employee of the United States” within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.³ The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician’s rationalized opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁴

ANALYSIS

The Office accepted that appellant sustained general allergic rhinitis due to exposure to substances, including shredded paper, in the workplace. Appellant claimed that this work-related condition caused disability for intermittent periods between January 7 and March 4, 2009.⁵ The Board finds that she did not submit sufficient medical evidence to establish that she became disabled for intermittent periods between January 7 and March 4, 2009.

² 5 U.S.C. §§ 8101-8193.

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ See *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

⁵ Appellant claimed 33.5 hours of disability during this period.

In a September 11, 2009 report, Dr. Eschenbacher, an attending Board-certified pulmonologist, who worked for the employing establishment, indicated that appellant was "ill with respiratory problems due to her asthma" for January 7, 27, 28 and 29 and March 4, 2009. He noted that she had been diagnosed with asthma with symptoms that were worsened by exposures in the workplace, especially while shredding paper.

The Board finds that the opinion of Dr. Eschenbacher does not establish that appellant had work-related disability between January 7 and March 4, 2009. There is no evidence that appellant was actually examined on the dates identified by Dr. Eschenbacher,⁶ who did not provide any objective clinical findings of her condition on the claimed dates between January 7 and March 4, 2009 or an opinion as to whether she was disabled due to her accepted rhinitis on those dates. Appellant's claim has only been accepted for general allergic rhinitis. The record does not contain rationalized medical evidence supporting the acceptance of any additional work-related condition such as asthma.

Appellant did not submit a medical opinion based on objective findings which demonstrated that she was disabled from work during the claimed periods due to the accepted work injury. Therefore, the Office properly found that she did not meet her burden of proof to establish entitlement to wage-loss compensation for intermittent periods between January 7 and March 4, 2009.⁷

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained work-related disability for intermittent periods between January 7 and March 4, 2009.

⁶ Dr. Eschenbacher stated that he had seen appellant on two occasions -- October 8 and 29, 2008.

⁷ Counsel suggested the Office has the burden to show that appellant's problems during the period in question were not work related. However, it is appellant's burden to show entitlement to compensation for specific periods. *See supra* note 2.

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2010 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 17, 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