

FACTUAL HISTORY

On April 2, 2009 appellant, then a 46-year-old mail clerk, filed a traumatic injury claim alleging that on March 19, 2009, while in the performance of her federal duties, she started coughing up blood, her nose started to bleed and she found it hard to breathe. In a May 25, 2009 statement, she stated that the branch of the employing establishment where she worked was undergoing remodeling and that the primer was so strong that it burned her nose and made her cough. Appellant stated that there was no ventilation in her work area. She also stated that workers started pulling down all the wiring in the ceiling in the back and that there was dust, dead rodents and droppings falling everywhere. Appellant described coughing up blood and her nose bleeding all the time. She described the onset of her symptoms in March 2009. On June 5, 2009 OWCP accepted appellant's claim for acute pharyngitis, shortness of breath and allergic rhinitis. It paid her compensation for wage loss and medical benefits.

Appellant received treatment from Dr. Prema Siva, a Board-certified internist. In a March 25, 2009 report, Dr. Siva diagnosed appellant with asthma, headache and allergic rhinitis, cause unspecified. She noted that appellant's symptoms began three weeks prior to the appointment. In a June 19, 2009 attending physician's report, Dr. Siva indicated that appellant's condition was caused or aggravated by her employment activity.

On October 13, 2009 OWCP referred appellant to Dr. Bharat D. Parekh, a Board-certified internist and pulmonologist, for a second opinion. In an October 23, 2009 report, Dr. Parekh stated that her symptoms were related to left-sided weakness, altered sensation to touch, vibratory senses and abnormal gait due to left-sided weakness. He indicated that appellant needed a neurological consultation. Dr. Parekh noted that she has described being unable to walk without holding onto something and was unable to lift or carry objects due to left extremity weakness. In a work capacity evaluation also dated October 23, 2009, he checked boxes indicating that appellant was not capable of performing her usual job. In a November 4, 2009 report, Dr. Parekh stated that her current diagnosis was weakness in the left side of her body with unsteady gait, sharp pain and tenderness in the left anterior chest. He opined that appellant's complaints of pain and weakness of left-sided body with unsteady gait were not work related. Dr. Parekh noted that the possible cause of her symptoms was unrelated pulmonary condition, reactive airway disease or asthma. He recommended a neurological evaluation. Dr. Parekh stated that appellant was unable to work indefinitely. In a November 20, 2009 report, he stated that her symptoms and diagnoses were not related to her work injury of March 19, 2009 and that her continued disability was not due to her work injury.

On April 7, 2010 OWCP issued a notice of proposed termination of appellant's wage-loss compensation as the medical evidence established that she was no longer disabled from work due to her accepted condition.

In a May 10, 2010 report, Dr. Siva stated that she evaluated appellant on March 17, 2009 for cough, congestion in chest and nose, diarrhea and vomiting and that these symptoms started after appellant was exposed to dust and other material at work where there was ongoing construction. She noted that she had treated appellant since that time and that she had also developed pain in the chest and left arm and panic attacks. Appellant was being evaluated by a neurologist for nerve damage. Dr. Siva also noted that appellant had a spirometry test which

showed asthma and that she was started on inhalers. She opined that all of his symptoms commenced in March 2009 after her exposure at work.

On October 21, 2010 OWCP terminated appellant's wage-loss compensation benefits effective October 23, 2010 but her medical benefits were not affected by the termination decision.

On November 25, 2010 appellant requested an oral hearing before OWCP's hearing representative. By decision dated December 16, 2010, OWCP denied her request for a hearing as it was untimely filed. It also reviewed appellant's request in its discretion and denied the request as it determined that the issues raised by her could be equally well addressed by submitting new evidence and requesting reconsideration.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.² Having determined that an employee has a disability causally related to his federal employment, it may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.³

Section 8123(a) provides that, 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.⁴ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the second opinion physician, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁵ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁶

ANALYSIS

On June 5, 2009 OWCP accepted that appellant sustained acute pharyngitis, shortness of breath and allergic rhinitis as a result of her employment. It terminated her compensation benefits effective October 23, 2010 as it found that she no longer had any disability related to her

² *Curtis Hall*, 45 ECAB 316 (1994).

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁴ 5 U.S.C. § 8123(a).

⁵ 20 C.F.R. § 10.321.

⁶ *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Barry Neutuch* 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

accepted condition. In making this determination, OWCP accorded determinative weight to the opinion of Dr. Parekh, the second opinion physician.

The Board finds that there is a disagreement between Dr. Siva, appellant's treating physician and Dr. Parekh, the second opinion physician, with regards to whether appellant remained disabled as a result of the accepted employment-related conditions. Dr. Siva reported that appellant suffered from numerous conditions including left-side weakness, pain in chest, reactive airway disease, allergice rhinitis and panic attacks. She opined that appellant's symptoms commenced in March 2009 after her exposure at work. Dr. Parekh opined that appellant's symptoms, including pulmonary condition, reactive airway disease and asthma, were not related to her work injury of March 19, 2009 although she was disabled from working. Accordingly, there was an unresolved conflict between appellant's treating physician and the second opinion physician with regards to whether appellant still had disability associated with her accepted work condition. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires OWCP to appoint a referee physician, also known as an impartial medical examiner, to resolve the conflict.⁷ The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation and medical benefits due to an unresolved conflict in the medical opinion.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective October 23, 2010.⁸

⁷ *Supra* note 4.

⁸ In light of the disposition of the termination issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 16 and October 21, 2010 are reversed.

Issued: October 24, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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