United States Department of Labor
Employees' Compensation Appeals Board

E.S., Appellant	)	
and	)	**Docket No. 11-1391**
	)	**Issued: February 10, 2012**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Santa Clara, CA, Employer	)	

Appearances:
Norman R. McNulty, Jr., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 25, 2011 appellant, through her attorney, filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) December 1, 2010 decision denying her claim for recurrence of disability. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] 5 U.S.C. 8101 *et seq.*

ISSUE

The issue is whether appellant sustained a recurrence of disability as of May 10, 2007 causally related to her accepted acute reactive asthma condition.[2]

On appeal, appellant's attorney argues that the report of OWCP's second opinion physician was incomplete and poorly rationalized. Alternatively, he contends that there is a conflict in medical opinion between appellant's treating physician and the second opinion physician.

FACTUAL HISTORY

On November 11, 2006 appellant, then a 39-year-old air traffic controller, filed a traumatic injury claim alleging that she experienced dizziness, swelling and redness of her throat, headache and a dry cough on November 10, 2006 due to exposure to toxic fumes produced by a sealant used during the installation of an heating, ventilation and air conditioning unit in the tower at the San Jose Municipal Airport where she worked.[3] Her claim was accepted for acute reactive asthma.

Appellant was treated by Dr. Safa Nsouli, who specializes in the treatment of asthma and allergies. Dr. Nsouli diagnosed asthma pursuant to chemical exposure at work and instructed appellant to avoid any exposure to diisocyanates.

In a January 12, 2007 report, Dr. Robert Kosnik, Board-certified in the field of occupational medicine, provided a history of injury and treatment, noting that appellant had been exposed to toluene diisocyanate in 1997. He opined that the November 2006 exposure to the sealant, which contained toluene diisocyanate, initiated an asthmatic response in appellant, who had previously been sensitized. Dr. Kostik recommended that appellant be removed from the workplace in order to avoid exposure to even the slightest amount of toluene diisocyanate, which could bring on an asthmatic reaction.

On March 5, 2007 appellant returned to work as an air traffic controller at the San Franciso International Airport (SFO), where she worked until May 11, 2007 when she stopped working and filed claims for total disability beginning that date. She also submitted claims for lost wages due to medical appointments for March 6 and May 4, 2007. In a letter dated May 21, 2007, appellant stated that she sustained an asthma attack at work on May 10, 2007. The record

[2] The Board notes that the December 1, 2010 decision framed the issues presented to include a determination as to whether appellant was entitled to wage-loss compensation for medical appointments on March 6 and May 4, 2007. The claims examiner did not, however, issue a ruling on that issue. Therefore, the Board does not have jurisdiction over that issue. *See* 20 C.F.R. § 501.2(c) (the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case).

[3] In a December 28, 2006 statement, appellant also alleged that she was exposed to the toxic fumes from November 9 to 14, 2006 and on November 24, 27 and 30, 2006. As she alleged exposure on several separate occasions, OWCP treated her claim as one for an occupational disease.

contains a May 10, 2007 emergency room report reflecting that she was treated on that date for an asthma condition.

In a note dated May 10, 2007, Dr. David Arrowsmith, Board-certified in emergency medicine, stated that he had examined appellant on that date and that her wheezing was relieved by the use of an inhaler. He indicated that she was disabled from work from May 10 to 13, 2007. In a May 14, 2007 disability slip, Dr. Nsouli placed appellant off work until she could be evaluated by a toxicologist.

In a June 20, 2007 report, Dr. Nsouli stated that appellant had been permanently sensitized to isocyantes and that continued exposure to even trace amounts for prolonged periods could be life threatening. He noted that pulmonary function testing showed significant improvement in February 2007, prior to her return to work. Following appellant's return to the San Francisco tower, where she experienced another asthma attack, May 14, 2007 testing showed a significant decrease in lung function. Dr. Nsouli diagnosed allergic reaction and sensitization to isocyantes and acute reactive asthma caused by repeated exposure to isocyanates in the workplace. He concluded that the unique work environment of an air traffic control tower contains pollutants that while not dangerous to the general public, caused appellant to experience acute asthma symptoms due to her sensitization to isocyanates.

On July 13, 2007 the employing establishment stated that it had no medical documentation of appellant's visits to a physician on the claimed dates. It further contended that her claim should be developed as a separate claim, as it related to claimed exposure at a separate facility, namely SFO rather than San Jose Municipal Airport.

OWCP referred appellant to Dr. Hsien-Wen Hsu, a Board-certified pulmonologist, for a second opinion medical examination and an opinion as to the cause of appellant's current condition and her work capacity. Dr. Hsu was instructed to base his opinion solely on the attached statement of accepted facts (SOAF). The June 12, 2007 SOAF provided that on or about November 9, 2006 appellant was exposed to, and inhaled, residual fumes of a Vulkem 642 sealant used during construction in the ceiling area of the Tower Cab in which she worked, and that her claim was accepted for acute reactive asthma attack as the work-related condition.

In a report dated August 16, 2007, Dr. Hsu provided a history of appellant's condition and treatment and a review of diagnostic testing. He also provided examination findings related to her abdomen, liver, kidney, spleen and musculoskeleton. Dr. Hsu diagnosed reactive asthma, which he opined was causally related to the accepted chemical exposure. Noting appellant's prior sensitization in 1997 of toluene diisocyanate and reexposure of Vulkem 642 on November 10, 2006, he stated: "It is well known that patients once exposed to isocyanate compound are sensitized for life and should be considered permanently sensitized. There is no known lower threshold limit as not to cause new asthma attack."

Dr. Hsu opined that appellant continued to suffer residuals of the work injury due to asthma, although she would be symptom free so long as she was removed from her usual workplace. He indicated that when she returned to work at SFO between March 5 and May 10

2007, she experienced progressive worsening of her symptoms to the point that another emergency room visit was required. Dr. Hsu stated:

> "Even [when] the isocyanates are 'within or below' OSHA mandated limits, there will still be allergic and respiratory consequences when [appellant] is [reexposed] to the substance. In this instance, unfortunately, I tend to also believe that even lower than detectable levels of isocyanate is likely to be present and cause new respiratory symptoms at above mentioned place. There is no stated threshold level."

In response to OWCP's inquiry regarding appellant's claim of disability due to the accepted injury, Dr. Hsu stated:

> "The disability began November 9, 2006 and at all times, the disability will last until new work location is assigned. Time off from work if would no longer be medically necessary when [appellant] is completely removed from the above mentioned Tower Cab of San Jose Airport."

Dr. Hsu stated that appellant could work in another workplace and in public in general. However, returning to the tower cab at San Jose Airport was "strongly not advisable." Dr. Hsu opined that appellant could return to full duty at a different location, but that chemical exposure should be avoided.

In a July 17, 2007 letter, OWCP informed appellant that the evidence of record was insufficient to establish that she was disabled during the claimed period due to her accepted injury or that she was entitled to compensation for time lost for medical appointments. It advised her to submit a rationalized medical report explaining how her claimed disability was causally related to her accepted November 10, 2006 injury.

In a report dated October 1, 2007, Dr. Nsouli opined that placing appellant at an airport environment with known isocyanate chemicals from jet exhaust was not advisable. Although it is assumed isocyanate levels are less than Occupational Safety and Health Administration (OSHA) guidelines in any airport environment, it would be contradictory to the avoidance of exposure statement to recommend suitable work at such a location.

By decision dated October 18, 2007, OWCP denied appellant's claim for total disability beginning May 11, 2007 and for benefits for medical appointments on March 6 and 4, May 2007. On the grounds that the medical evidence failed to establish that she was disabled or missed work due to her accepted injury. OWCP found that the weight of the medical evidence was contained in Dr. Hsu's second opinion report, which established that she was capable of working at SFO.

On December 3, 2007 appellant requested reconsideration. She submitted a copy of a July 1, 2003 report on the topic of hazardous air pollutants associated with aircraft, airports and aviation. Appellant contended that Dr. Hsu reviewed the report, he would have opined that work in any airport would exacerbate her asthma condition.

By decision dated March 3, 2008, OWCP denied modification of its prior decision.

On January 30, 2009 appellant again requested reconsideration. She noted that she had taken disability retirement as of October 7, 2007 due to the employing establishment's inability to accommodate her asthma condition.

In a January 6, 2010 decision, OWCP again denied modification of its prior decisions.

On February 8, 2010 appellant submitted an occupational disease claim, Form CA-2, alleging that she had sustained a new injury at SFO on May 10, 2007. She stated that once she began working at SFO, she needed to use her inhaler on a daily basis to alleviate asthma symptoms. By May 10, 2007, appellant was no longer able to control the symptoms with the inhaler. She opined that exposure to toxins at the airport such as xylene and toluene brought on her symptoms.

In a letter dated February 17, 2010, OWCP informed appellant that her February 8, 2010 occupational disease claim was duplicative of her November 25, 2006 claim, which had been previously addressed. Appellant was advised that she must pursue the appeal rights associated with that claim.

On August 30, 2010 appellant, through counsel, requested reconsideration of the January 6, 2010 decision, contending that OWCP had improperly relied on Dr. Hsu's report in denying the recurrence claim because it was not well rationalized. Counsel argued that the SOAF was defective in that it failed to state that appellant had been reassigned to SFO from March 7 to May 11, 2007. Further, OWCP had failed to ask Dr. Hsu for an opinion as to whether exposure to fumes containing isocyanate components at SFO had caused or contributed to the asthma attack that caused the May 11, 2007 work stoppage. Alternatively, counsel argued that a conflict in medical opinion existed between Dr. Nsouli and Dr. Hsu.

By decision dated December 1, 2010, OWCP denied modification of its prior decisions, finding that the weight of the medical evidence was represented by Dr. Hsu's August 16, 2007 second opinion report, which was unequivocal and based on objective findings. The claims examiner found that the SOAF was not defective due to its failure to include reference to appellant's position at SFO, because appellant informed Dr. Hsu of her position at SFO from March 5 to May 11, 2007.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[4] This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical

[4] 20 C.F.R. § 10.5(x).

requirements of such an assignment are altered so that they exceed his or her established physical limitations.[5]

Appellant has the burden to establish by the weight of the substantial, reliable and probative evidence a causal relationship between his recurrence of disability and her employment injury.[6] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[7]

ANALYSIS

The Board finds that this case is not in posture for a decision. OWCP found that the medical evidence failed to establish that appellant was disabled as of May 11, 2007 due to her accepted injury, based on Dr. Hsu's August 16, 2007 second opinion report. The Board finds, however, that Dr. Hsu's report is insufficient to form the basis of OWCP's December 1, 2010 decision.

Appellant's treating physicians opined that appellant was disabled as of May 11, 2007 as a result of her accepted condition. On May 14, 2007 Dr. Nsouli placed her off work based on pulmonary testing that showed a significant decrease in lung function. On June 20, 2007 he stated that appellant had been permanently sensitized to isocyantes and that continued exposure to even trace amounts for prolonged periods could be life threatening. Noting that appellant had experienced another asthma attack following her return to the San Francisco tower, Dr. Nsouli concluded that the unique work environment of an air traffic control tower contains pollutants that while not dangerous to the general public, caused appellant to experience acute asthma symptoms due to her sensitization to isocyanates. On October 1, 2007 he opined that placing her at an airport environment with known isocyanate chemicals from jet exhaust was not medically advisable. On May 10, 2007 Dr. Arrowsmith examined appellant and opined that she was disabled from work from May 10 through 13, 2007. While the treating physicians' reports are not sufficiently rationalized to establish conclusively that appellant was disabled as of May 11, 2007 due to her accepted acute reactive asthma condition, they strongly support her claim. Moreover, they are not contradicted by any other medical evidence of record, including Dr. Hsu's second opinion report.

OWCP referred appellant to Dr. Hsu for an opinion as to the cause of appellant's current condition and her work capacity. Dr. Hsu was instructed to base his opinion solely on the SOAF, which provided that appellant was exposed to residual fumes of a Vulkem 642 sealant on November 9, 2006 in the ceiling area of the Tower Cab in which she worked, and that her claim was accepted for acute reactive asthma attack. The Board finds that his report is unclear and

[5] *Id.*

[6] *Carmen Gould*, 50 ECAB 504 (1999).

[7] *Mary A. Ceglia*, 55 ECAB 626 (2004).

fails to provide an unequivocal opinion on the relevant issue in this case, namely whether appellant was disabled from work as of May 11, 2007 due to the accepted asthma condition.

Dr. Hsu agreed that appellant's reactive asthma was causally related to the accepted chemical exposure and that she should be considered permanently sensitized. He implied that her May 10, 2007 asthma attack was caused by exposure to toxins at SFO following her return to work on March 5, 2007, noting that she experienced a progressive worsening of her injury-related symptoms to the point that another emergency room visit was required. Dr. Hsu did not, however, provide an unequivocal opinion as to whether the May 10, 2007 asthma attack was a consequence of the accepted injury or a new injury due to a new exposure.[8] For this reason, the report is of diminished probative value.

Dr. Hsu's opinion was also based upon an incomplete SOAF, which failed to inform him that appellant began working at SFO on March 5, 2007. Although appellant informed him of her relocation, Dr. Hsu's statement that time off from work would no longer be medically necessary if appellant were completely removed from the "Tower Cab of San Jose Airport" reflects confusion on his part as to where she was working on May 10, 2007.

Proceedings under FECA are not adversarial in nature, and OWCP is not a disinterested arbiter.[9] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[10] Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[11] As it undertook development of the medical evidence by referring appellant to Dr. Hsu, it had an obligation to secure a report adequately addressing the relevant issue.[12] The obligation continues until it receives a proper report. Therefore, the case shall be remanded to OWCP for a supplemental opinion from Dr. Hsu, which provides clarification and elaboration. If Dr. Hsu is unwilling or unable to clarify and elaborate on his opinion, the case should be referred to another appropriate specialist.

On remand, OWCP should also develop the evidence regarding appellant's claim that she was exposed to toxins at the San Francisco airport by requesting relevant information from the employing establishment. Evidence regarding the level of appellant's exposure at SFO is critical to a determination regarding her claim. Therefore, once OWCP has developed the evidence as it deems necessary, the information should be provided to Dr. Hsu for his review. After such further development as it deems necessary, OWCP should issue an appropriate decision.

[8] The Board notes that OWCP summarily dismissed appellant's occupational disease claim alleging a new injury as of May 10, 2007, without addressing the merits of her claim.

[9] *Vanessa Young*, 55 ECAB 575 (2004).

[10] *Richard E. Simpson*, 55 ECAB 490 (2004).

[11] *Melvin James*, 55 ECAB 406 (2004).

[12] *Peter C. Belkind*, 56 ECAB 580 (2005).

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2010 decision of the Office of Workers' Compensation Programs be set aside, and the case remanded to OWCP for further action consistent with this decision.

Issued: February 10, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board