

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation benefits, effective March 6, 2024, as she no longer had disability causally related to her accepted March 29, 2018 employment injury; and (2) whether appellant has met her burden of proof to establish continuing employment-related disability on or after March 6, 2024 due to her accepted March 29, 2018 employment injury.

FACTUAL HISTORY

On June 6, 2018 appellant, then a 57-year-old medical supply technician, filed a claim for occupational disease (Form CA-2) alleging that she sustained an employment-related respiratory condition due factors of her federal employment including daily exposure to chemical irritants. She first became aware of her condition on March 28, 2018 and realized it was caused or aggravated by her employment on April 10, 2018. By decision dated April 25, 2019, OWCP accepted the claim for asthma aggravated by workplace environment. It paid her wage-loss compensation benefits on the supplemental rolls from April 10, 2018 through July 20, 2019 and on the periodic rolls effective July 21, 2019.

In a July 17, 2019 report, Dr. Robert G. Perry, an internal medicine specialist, indicated that he had treated appellant for aggravation of her asthma due to chemical exposure at work. He noted that she was experiencing significant respiratory problems attributable to exposure of air pollutants such as dust and chemical solvents at work which aggravated her asthma. Dr. Perry advised that appellant should have been avoiding further exposure to such chemicals, solvents and substances as she had been exposed to in her work environment. He opined that appellant's restriction to avoid areas contaminated with air pollutants such as dust and chemical solvents was permanent.

In a July 22, 2019 report, Dr. Carlos Santos, a Board-certified internist and pulmonologist, continued appellant's restriction to avoid work areas contaminated with air pollutants such as dust and chemical solvents. He noted that the restriction was permanent and continuing.

On September 14, 2023 OWCP referred appellant along with an August 29, 2023 statement of accepted facts (SOAF), the case record, and a series of questions, to Dr. Jeffrey Wolkowicz, a Board-certified internist and pulmonologist, for a second opinion evaluation to determine the nature and extent of appellant's employment-related conditions and her work capacity.

In an October 3, 2023 report, Dr. Wolkowicz recounted his review of appellant's medical records, noting that an allergist had diagnosed appellant with multiple environmental allergies and asthma and that at least three pulmonologists diagnosed asthma. He also noted that in the past she was diagnosed with mild intermittent asthma and allergic rhinitis, and had been advised to start immunotherapy by an allergist. Dr. Wolkowicz diagnosed moderate persistent asthma, uncomplicated. He opined that appellant's asthma was well controlled, her diagnostic testing was normal, there was no pulmonary problem that should limit her ability to work in any way, and that she could return to work with no restrictions. Dr. Wolkowicz further noted that he could not exclude possible overlying psychologic issues and that her multiple proven allergies, which may be exacerbated by certain chemical exposures and resulted in significant postnasal drainage and

upper airway congestion, may play a role in her complaints. On October 31, 2023 he completed several forms, including a work capacity evaluation for cardiovascular/pulmonary conditions (Form OWCP-5b) in which he opined that appellant was capable of performing her usual job without restriction and she was not taking any medications that impacted her ability to work.

By notice dated November 30, 2023, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits based on Dr. Wolkowicz' October 3, 2023 medical opinion that the residuals of her accepted work-related asthma condition had ceased without disability or residuals. It afforded her 30 days to submit additional evidence or argument challenging the proposed action.

OWCP subsequently received progress reports dated September 25 and December 18, 2023 from Dr. Santos who noted appellant's history of persistent asthma with acute exacerbation. Dr. Santos continued to diagnose asthma and continued appellant's medication treatment plan.

By decision dated March 6, 2024, OWCP terminated appellant's benefits, effective that date, finding that the medical evidence of record established that she no longer had disability causally related to her accepted March 29, 2018 employment injury. The weight of the medical evidence was accorded to the opinion of the second opinion physician, Dr. Wolkowicz. Medical benefits were not terminated.

On April 4, 2024 appellant, through counsel, requested reconsideration.

In March 18, 2024 progress and attending physician's reports (Form CA-20), Dr. Santos noted appellant's history of injury and diagnosed severe persistent asthma. In the Form CA-20, he opined that appellant's exposure to chemicals at work caused reactive airway and asthma and that appellant was totally disabled from working commencing April 2019.

In a March 27, 2024 letter, Dr. Santos recounted that he had treated appellant in regard to the aggravation of her asthma due to chemical exposure at work. He reviewed her medical records and indicated that appellant has been avoiding further exposure to such chemicals, solvents and substances as exposed to in her work environment. Dr. Santos related that appellant's restriction to avoid areas contaminated with air pollutants such as dust and chemical solvents was a permanent and continuing restriction. He disagreed with Dr. Wolkowicz' October 3, 2023 opinion that appellant's pulmonary condition should not limit her ability to work, and she has no restrictions. Dr. Santos noted that while Dr. Wolkowicz indicated that appellant's moderate persistent asthma with proven multiple environmental allergies was well-controlled, it was controlled by avoiding the environmental chemicals that caused or aggravated her asthma. He further pointed out that the pulmonary function test included with Dr. Wolkowicz' report was given at a time when appellant had not been exposed to chemicals and therefore did not measure the effects of exposure.

On April 9, 2024 OWCP requested an addendum report from Dr. Wolkowicz which discussed whether the new evidence from Dr. Santos changed his opinion regarding whether appellant had ongoing disability from work related to the accepted aggravation of asthma on March 29, 2018.

In an April 14, 2024 addendum, Dr. Wolkowicz disagreed with Dr. Santos' opinion. In response to Dr. Santos' argument that "the pulmonary function test included in Dr. Wolkowicz'

report was given at a time [appellant] had not been exposed to chemicals, so it does not measure the effects of exposure.” Dr. Wolkowicz stated that when he examined appellant, she had indicated that she was having her usual asthma symptoms, which she had daily. Despite this, appellant’s examination was completely normal, and her chest was perfectly clear. Additionally, her pulmonary function test, the best objective measure of an individual’s lung function, was also normal. As appellant was on asthma therapy at that time, the possibilities were either that she had normal lung function or any asthma was perfectly well controlled, and, more likely than not, would not prevent her from any work. Dr. Wolkowicz additionally noted that everyone who examined appellant agreed that allergies/upper airway complaints were a significant part of her problem and an allergist had recommended immunotherapy for her complaints that her asthma was not adequately controlled. He opined that appellant’s allergy complaints were a significant part of her complaints when exposed to odors, chemicals, but that Dr. Santos neglected to consider appellant’s allergies.

By decision dated May 23, 2024, OWCP denied modification of its March 6, 2024 decision. It found that the weight of the medical evidence with regard to ongoing disability related to the accepted condition remained with Dr. Wolkowicz.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee’s benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

Section 8123(a) provides that, if there is a 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.⁶ The implementing regulations provide that, if a conflict exists between the medical opinion of the employee’s physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a

³ See *T.C.*, Docket No. 19-1383 (issued March 27, 2020); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁴ See *R.P.*, *id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁵ *K.W.*, Docket No. 19-1224 (issued November 15, 2019); see *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ 5 U.S.C. § 8123(a); see *K.C.*, Docket No. 24-0628 (issued September 17, 2024); *C.C.*, Docket No. 20-0151 (issued July 30, 2020); *M.G.*, Docket No. 19-1627 (issued April 17, 2020); *R.C.*, Docket No. 12-0437 (issued October 23, 2012).

physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁷

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner (IME) for the purpose of resolving the conflict, the opinion of the IME, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective March 6, 2024, as she no longer had disability causally related to her accepted March 29, 2018 employment injury.

Appellant's treating physicians, Drs. Perry and Santos reported that appellant was permanently restricted from exposure to the chemicals she had been exposed to in her work environment. In a July 17, 2019 report, Dr. Perry related that appellant should have been avoiding further exposure to such chemicals, solvents and substances that she had been exposed to in her work environment. He opined that appellant's restriction to avoid areas contaminated with air pollutants such as chemical solvents were permanent. In a July 22, 2019 report, Dr. Santos continued appellant's restriction to avoid work areas contaminated with air pollutants such as chemical solvents. He noted that the restriction was permanent and continuing.

OWCP referred appellant to Dr. Wolkowicz for a second opinion evaluation to determine the status of her accepted conditions and work capacity. In his October 3, 2023 report, Dr. Wolkowicz diagnosed moderate persistent asthma. Based on normal examination findings and his determination that appellant's asthma was well-controlled, he opined that she could perform her usual job without restriction and thus, had no continuing disability aggravated by her workplace environment. Dr. Wolkowicz additionally noted that appellant's multiple proven allergies, which could be exacerbated by certain chemical exposures, may play a role in her complaints.

It is well established that, when there are opposing medical reports of virtually equal weight and rationale, the case should be referred to an IME for the purpose of resolving the conflict.⁹ The Board finds that the medical reports of Drs. Perry and Santos were in conflict with the report of Dr. Wolkowicz on the issue of whether appellant's work-related asthma due to chemical exposure had resolved such that she could perform her usual job without restrictions. OWCP was therefore,

⁷ 20 C.F.R. § 10.321.

⁸ *Id.* See also *S.L.*, Docket No. 24-0220 (issued May 15, 2024); *J.H.*, Docket No. 22-0981 (issued October 30, 2023); *N.D.*, Docket No. 21-1134 (issued July 13, 2022); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

⁹ *M.F.*, Docket No. 24-0932 (issued December 19, 2024); *A.N.*, Docket No. 24-0531 (issued September 4, 2024); *S.S.*, Docket No. 24-0773 (issued September 16, 2024); *A.E.*, Docket No. 23-0756 (issued December 14, 2023); *D.P.*, Docket No. 21-0534 (issued December 2, 2021); *N.A.*, Docket No. 21-0542 (issued November 8, 2021); *G.B.*, Docket No. 16-0996 (issued September 14, 2016); *James P. Roberts, id.*.

required to refer appellant to an IME, pursuant to 5 U.S.C. § 8123(a), to resolve the conflict prior to its termination of her wage-loss compensation.¹⁰

The Board finds, therefore, that OWCP improperly terminated appellant's wage-loss compensation, effective March 6, 2024.¹¹

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective March 6, 2024, as she no longer had disability causally related to her accepted March 29, 2018 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 18, 2025
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹⁰ *Id.*

¹¹ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.