U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARVIN L. STURGILL and DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Norton VA

Docket No. 01-687; Submitted on the Record; Issued December 16, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's pneumoconiosis as work related; and (2) whether the Office properly terminated appellant's compensation.

On September 21, 1991 appellant, then a 58-year-old coal mine safety and health inspector, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he suffered respiratory dysfunction and coal workers' pneumoconiosis as a result of his federal employment. He had been a mine inspector since 1976 and had a history of respiratory problems.

Appellant also filed a claim for traumatic injury and compensation (Form CA-1) after exposure to dangerous chemicals in August 1991. In a November 7, 1991 letter, the Office notified him that they determined the incident resulting in appellant filing the Form CA-1 occurred over more than one day and, therefore, the Form CA-1 file was administratively closed and consolidated with his Form CA-2 claim. Appellant retired in 1991.

In reports dated September 23, 1991 and April 15, 1992, Dr. Emory H. Robinette, a pulmonary specialist, diagnosed coal workers' pneumoconiosis with associated obstructive pulmonary disease.

In a September 23, 1991 report, Dr. Robinette reported that a previous PFS in 1987 was "*generally unremarkable*" and the PFS on September 23[,] [19]91 was "*within normal limits.*" (Emphasis in the original.)

In an October 8, 1991 report, Dr. Robinette wrote that a chest x-ray showed no evidence of coal workers' pneumoconiosis.

In an April 28, 1992 decision, the Office accepted the claim and appellant received total disability compensation until he returned to work on May 31, 1996, as a science technician.

On August 26, 1996 appellant filed a claim for permanent impairment under section 8107 of the Federal Employees' Compensation Act.

In a June 4, 1999 letter, appellant was referred to Dr. John Forehand, a pulmonary specialist and certified NIOSH B reader, for a second opinion referral.

In a June 28, 1999 report, Dr. Forehand wrote:

> "[Appellant] would not be able to return to work … does not posses the stamina or capacity to return to his last job as a federal coal mine inspector or as a physical science technician…. His disability stems from a combination of decreased visual acuity, hearing loss and significant musculoskeletal discomfort, particularly in his right hand, arm, shoulder, neck and lower back. No significant respiratory impairment or radiographic or clinical evidence of coal workers' pneumoconiosis was identified. [Appellant] has sufficient residual ventilatory and gas exchange capacity to return to his [old] job. He was unable to perform a valid spirogram, which does raise the possibility of airway obstruction. Nevertheless, the measured values (FVC 65 percent of predicted; FEV^{1}, 62 percent of predicted) exceeded [the employing establishment] and American Medical Association disability standards. An arteria blood gas test with exercise was normal. A chest x-ray was essentially clear. There is no objective evidence of lung disease.
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> "My conclusions are at variance with others who have examined [appellant]. He was seen Knoxville Pulmonary Group, P.A. on March 15, 1979 who diagnosed obstructive lung disease. A ventilatory function studies (PFS) report indicates an FVC of 59 percent of predicted and an FEV^{1} of 54 percent predicted but no volume-time curves were available to ascertain the validity of the test. A chest x-ray at that time revealed no evidence of coal workers' pneumoconiosis."
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> "Predicated on my examination and the lack of abnormal objective testing by others, I conclude that [appellant] does not now have nor has ever had a totally and permanently disabling … condition which might have arisen from his tenure in underground coal mine employment as a miner or mine inspector."

In a July 28, 1999 letter, the Office notified appellant of a conflict in the medical evidence and referred him to Dr. George Zaldivar, Board-certified in internal medicine with a specialty in pulmonary diseases and a certified B Reader, for an independent medical examination.

After a physical examination and extensive review of appellant's medical and work history, in a September 29, 1999 report, Dr. Zaldivar concluded:

> "[Appellant] does not have pulmonary impairment at all; nor does he have any bronchospastic disease of the lungs…. He has not acquired coal workers' pneumoconiosis. [Appellant] has not inhaled sufficient dust to have developed a

pulmonary reaction that could be visible radiographically. Although this does not mean that macules of coal dust might be present in the lungs if a biopsy is done, it does mean that it is not expected that any pulmonary impairment has occurred as the result of air reaction of the coal dust. No such reaction is visible.

"Based on all the information at my disposal, my opinion is that [appellant] is in Class 1 or zero percent impairment of the [American Medical Association] *Guides for the Evaluation of Permanent Impairment,* [fourth] [e]dition [A.M.A., *Guides*].

Regarding Dr. Robinette's report that appellant did not reach the predicted maximal oxygen consumption because of the increase in the heart rate to 143 beats per minute Dr. Zaldivar wrote that "there are no details on this exercise test. However, all that such an exercise test means is that there was poor physical conditioning rather than any pulmonary limitation. Dr. Robinette did a Methcholine Bronchoprovocation test … and said that they were normal."

The Office then referred appellant's medical records to the district medical adviser. In a report dated October 31, 1999, the district medical adviser wrote "[appellant] has no findings on his chest x-ray to [accept] a diagnosis of coal workers' pneumoconiosis … the fact that the diffusion capacities also were normal weighs against a restrictive lung disease of clinical significance. Coal workers' pneumoconiosis is a restrictive lung condition. The eight minutes of walking for exercise test … shows primarily that the claimant is deconditioned. The testing did not show respiratory dysfunction or … cardiovascular dysfunction *per se*."

In a November 11, 1999 notice of proposed termination, the Office stated the prior acceptance of pneumoconiosis as a result of appellant's federal employment was in error. It proposed terminating appellant's compensation and rescinding the acceptance based on the new medical reports submitted by Drs. Forehand and Zaldivar. The Office provided appellant 30 days to submit new evidence.

No new evidence was submitted. In a December 30, 1999 decision, the Office terminated appellant's compensation effective January 2, 2000 finding the weight of the evidence with Dr. Zaldivar's well-rationalized report. The Office also rescinded its acceptance of appellant's claim based on the new evidence submitted by Drs. Zaldivar and Forehand.

In a January 4, 2000 letter, appellant requested reconsideration. In support of his request, appellant submitted Dr. Robinette's treatment notes from October 1, 1999, January 24 and March 8, 2000.

In the January 24, 2000 notes, Dr. Robinette wrote:

"I initially evaluated [appellant] in 1987 for his pulmonary disease. At that time [he] was found to have evidence of pneumoconiosis with a profusion of abnormality of 1/0 predominant Q/P opacities. The x-rays were abnormal with an azygos lober in his right upper lobe which was felt to be a normal variant. As part of [appellant's] evaluation over the next several years an echocardiogram was performed which documented normal left ventricular function. Because of

progressive exertional breathlessness an exercise test was performed in September 1991.... Graphic analysis of his oxygen and CO2 production were measured every 20 seconds and clearly documented abnormal ventilatory response to exercise without overt oxygen desaturation. [Appellant] had exercise breathlessness and dyspnea occurring as a consequence of intrinsic lung disease.

"[Appellant's] symptoms have been progressive. Because other outpatient testing was performed on [appellant]. I have not repeated his pulmonary function studies in the past five years. It is my medical opinion as a Board[-]certified pulmonary Internist and Certified B Reader that [appellant] does have evidence of pneumoconiosis and his repistory impairment is so severe that he cannot perform the duties that he performed as a federal mine inspector. He has an abnormal ventilatory response to exercise and this condition is chronic and irreversible…."

In June 23, 2000 decision, the Office denied modification finding the weight of the medical evidence remained with the Dr. Zaldivar, the impartial medical examiner.

In a July 28, 2000 letter, appellant requested reconsideration. In support of his request, appellant submitted a June 2, 2000 medical report from Dr. Robinette and an emergency report from Dr. A.T. Shukla of the Norton Community Hospital.

In his February 22, 2000 report, Dr. Shukla wrote that appellant's lungs revealed bilateral diminished air entry with bilateral few rales ad wheezes. He diagnosed appellant with an exacerbation of chronic obstructive pulmonary disease.

In the June 2, 2000 report, Dr. Robinette stated that appellant's pulmonary function studies revealed a FEV[1] of 2.7 or 97 percent of predicted and FVC of 3.35 or 83 percent of predicted. The diffusion capacity was slightly reduced at 78 percent of predicted. Lung volumes normal. "He continues to have severe dyspnea on exertional activity and he has episodes of paroxysmal wheezing."

In a November 20, 2000 decision, the Office again denied appellant's claim finding the additional medical evidence insufficient to overcome the special weight of Dr. Zaldivar as the impartial medical examiner. The Office further found that Dr. Shukla's report did not indicate any fibrotic markings or densities that would be considered if an ILO classification of a chest x-ray was being offered.

The Board finds that the Office properly rescinded and terminated appellant's compensation.

Under the Federal Employees' Compensation Act,[1] once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[2] The Office may not terminate compensation without establishing that the disability ceased or that it was no

[1] 5 U.S.C. §§ 8101-8193.

[2] *Charles E. Minniss,* 40 ECAB 708, 716 (1989); *Vivien L. Minor,* 37 ECAB 541, 546 (1986).

longer related to the employment.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

The Office properly determined that there was a conflict in the medical opinion between Dr. Robinette, appellant's treating physician and Dr. Forehand, a Board-certified pulmonary specialist acting as an Office referral physician, regarding whether appellant had work-related pneumoconiosis. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Zaldivar for an impartial medical examination and an opinion on the matter.[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]

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Zaldivar , the impartial medical specialist selected to resolve the conflict in the medical opinion. The report of Dr. Zaldivar establishes that, while appellant suffered from pulmonary problems, he did not have coal miners' pneumoconiosis.

The Board has carefully reviewed the opinion of Dr. Zaldivar and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Zaldivar's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, he provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition which comported with this analysis.[7] Dr. Zaldivar provided medical rationale for his opinion by explaining why the earlier tests relied on in accepting appellant's claim were deficient and why he did not believe appellant sustained coal miners' pneumoconiosis.

The Board further finds the Office properly rescinded its acceptance of appellant's claim.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Act and, where supported by the evidence, set aside or

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[3] *Id.*

[4] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[5] Section 8123(a) of the Act provides in pertinent part: "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." 5 U.S.C. 8123(a).

[6] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[7] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

modify a prior decision and issue a new decision.[8] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[9] It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[10] This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.[11]

The reports by Drs. Forehand and Zaldivar were new and reliable medical evidence sufficient to reopen and rescind appellant's claim. They are both certified pulmonary specialists and Certified B readers who reviewed past medical evidence and conducted examinations and tests and concluded that appellant never sustained coal miners' pneumoconiosis. These reports also provided well-rationalized explanations supporting their conclusions and why the previous medical evidence did not support the findings that appellant suffered from pneumoconiosis.

The Board further finds the Office properly denied modification on appellant's request for reconsideration. The medical reports submitted on reconsideration were either duplicative of evidence already in the file or new evidence supporting that appellant had a pulmonary condition, but does not attribute appellant's condition to his federal employment or provide a well-rationalized explanation why Dr. Zaldivar's report was in error. The Office properly found that weight of the medical evidence remained with Dr. Zaldivar's, as the impartial medical examiner.

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[8] *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

[9] *Shelby J. Rycroft*, 44 ECAB 795, 802-03 (1993). *Compare Lorna R. Strong*, 45 ECAB 470, 479-80 (1994).

[10] *See Frank J. Meta, Jr.,* 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

[11] *Laura H. Hoexter (Nicholas P. Hoexter),* 44 ECAB 987, 994 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990); *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

The decisions of the Office of Workers' Compensation Programs dated November 20, June 23, 2000 and December 30, 1999 are hereby affirmed.

Dated, Washington, DC
December 16, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member