

February 2, 2012

The Honorable Jeff Adkins
Gallia County Prosecuting Attorney
18 Locust Street, Room 1267
Gallipolis, Ohio 45631-1267

SYLLABUS:

2012-003

Under 10A Ohio Admin. Code 4123:1-21-02(P)(3) (2010-2011 Supplement), a physician or licensed health care professional uses his education, experience, and professional judgment to determine whether a fire fighter shall be medically certified to use respiratory protection equipment. This determination is made by evaluating a fire fighter's health and physical condition by means of a medical examination of the fire fighter or the fire fighter's responses to the Occupational Safety and Health Administration questionnaire found in 29 C.F.R. § 1910.134, Appendix C (2011).



MIKE DEWINE

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OPINION NO. 2012-003

The Honorable Jeff Adkins
Gallia County Prosecuting Attorney
18 Locust Street, Room 1267
Gallipolis, Ohio 45631-1267

Dear Prosecutor Adkins:

You have requested an opinion regarding the criteria used by a physician to determine whether a fire fighter shall be medically certified to use respiratory protection equipment pursuant to 10A Ohio Admin. Code 4123:1-21-02(P)(3) (2010-2011 Supplement). In your letter you explain that rule 4123:1-21-02(P)(3) requires

all members of fire departments who might be required to use respiratory equipment to be medically certified annually. In an attempt to comply with the regulations, several of our volunteer fire departments have directed inquiries to our office about the nature of the medical certification and medical examination required. My office's research of this issue leads us to the same conclusion as the inquiring [fire fighters] ... [n]o appropriate pass/fail criteria exist for the medical certification necessary to comply with [rule 4123:1-21-02(P)(3)].

Accordingly, you ask us to advise you regarding the existence of medically appropriate pass/fail criteria to be used in medically certifying fire fighters to use respiratory protection equipment.¹

R.C. 4121.13(B) requires the Administrator of Workers' Compensation to adopt rules establishing reasonable standards for the use of safety devices and safeguards for the protection of all employees. One such rule is rule 4123:1-21-02, which addresses protective clothing and equipment for fire fighters. The rule requires an employer to "provide and require the use of personal protective

¹ We understand your reference to "pass/fail criteria" to mean a set of measurements, standards, or tests that, individually or in the aggregate, establish objectively whether or not a fire fighter shall be medically certified. "Pass/fail criteria" also encompasses the concept of making a determination on a quantitative basis (*e.g.*, establishing a scoring scheme for a fire fighter's health history that requires a certain number of responses of a certain type to conclude that the fire fighter is or is not fit to use respiratory protection equipment).

clothing and equipment ... when employees are required to work in a hazardous environment that may be encountered during structural fire fighting activities and under similar conditions during training activities.” Rule 4123:1-21-02(A). Protective clothing must consist of at least “foot protection; hand protection; body protection; eye, face, and head protection; and respiratory protection.” Rule 4123:1-21-02(B). With respect to respiratory protection, the rule declares, in pertinent part:

(1) All fire fighters exposed to hazardous atmospheres from fires and other emergencies, or where the potential for such exposure exists, shall be provided with self-contained breathing apparatus (“SCBA”) approved by the national institute for occupational safety and health (NIOSH) and the mine safety and health administration (MSHA).

(2) The fire department shall adopt and maintain a respiratory protection program that addresses the selection, inspection, safe use, and maintenance of respiratory protection equipment, training in its use, and the assurance of air quality testing.

(3) All members who might be required to use respiratory protection equipment shall be medically certified by a physician, or by a state of Ohio licensed health care professional who can perform medical evaluations under the supervision of a physician, on an annual basis. Medical certification can be obtained by a medical examination, or by using the medical questionnaire as referenced in CFR 1910.134 Appendix C.

Rule 4123:1-21-02(P).

Other than the reference to the medical questionnaire, the rule does not enumerate or explain the criteria a physician or licensed health care professional shall use to determine whether a fire fighter shall be medically certified to use respiratory protection equipment. The Bureau of Workers’ Compensation has informed us that rule 4123:1-21-02(P)(3) was intended to reference the criteria for medical evaluation implemented by the Occupational Safety and Health Administration (OSHA) in 29 C.F.R. § 1910.134, Appendix C (2011).²

² 29 C.F.R. § 1910.134(e) (2011) “specifies the minimum requirements for medical evaluation that employers must implement to determine the employee’s ability to use a respirator.” With respect to the medical evaluation procedure, 29 C.F.R. § 1910.134(e)(2) (2011) states as follows:

(i) The employer shall identify a physician or other licensed health care professional (PLHCP) to perform medical evaluations using a medical questionnaire or an initial medical examination that obtains the same information as the medical questionnaire.

(ii) The medical evaluation shall obtain the information requested by the questionnaire in Sections 1 and 2, part A of appendix C of this section.

The OSHA questionnaire, 29 C.F.R. § 1910.134, Appendix C (2011), is meant to elicit an extensive inventory of a fire fighter's health history. Part A of the questionnaire is to be completed by the fire fighter, regardless of the type of respiratory equipment he will use. Section 1 of Part A asks the fire fighter to furnish demographic information and information about the type of respirator the fire fighter will use. Section 2 of Part A asks the fire fighter to answer questions about his medical history and habits with respect to tobacco use, seizures, diabetes, allergic reactions that may interfere with breathing, claustrophobia, or any difficulty smelling odors. The questionnaire also asks about the fire

If the medical examination indicates a follow-up examination is needed, or if an employee responds positively to any of questions 1 through 8 in Section 2, Part A of Appendix C, the employer is required to ensure that a follow-up medical examination is provided for the employee. 29 C.F.R. § 1910.134(e)(3)(i) (2011). If the physician conducts a follow-up medical examination, he shall include "any medical tests, consultations, or diagnostic procedures that the [physician] deems necessary to make a final determination." 29 C.F.R. § 1910.134(e)(3)(ii) (2011). 29 C.F.R. § 1910.134(e)(6) (2011) provides in pertinent part:

In determining the employee's ability to use the respirator, the employer shall:

(i) Obtain a written recommendation regarding the employee's ability to use the respirator from the [physician]. The recommendation shall provide only the following information:

(A) Any limitations on respirator use related to the medical condition of the employee, or relating to the workplace conditions in which the respirator will be used, including whether or not the employee is medically able to use the respirator;

(B) The need, if any, for follow-up medical evaluations; and

(C) A statement that the [physician] has provided the employee with a copy of the [physician's] written recommendation.

It is evident that the provisions of 29 C.F.R. § 1910.134(e) (2011) are more specific than rule 4123:1-21-02(P)(3) insofar as 29 C.F.R. § 1910.134(e) (2011) expressly requires that the physician's medical examination obtain the same information as the questionnaire. Nevertheless, the determination of whether a fire fighter is medically able to use the respirator under 29 C.F.R. § 1910.134(e) (2011) involves the exercise of the physician's discretion based on his sound professional judgment. Thus, although it may seem that the more detailed provisions of 29 C.F.R. § 1910.134(e) (2011) establish a more stringent standard than rule 4123:1-21-02(P)(3), as will be discussed below, both regulations rely on the professional judgment of the certifying physician for the ultimate determination of whether the fire fighter shall be medically certified to use respiratory protection equipment.

Moreover, while rule 4123:1-21-02(P)(3) permits the use of the questionnaire in 29 C.F.R. § 1910.134, Appendix C (2011), rule 4123:1-21-02(P)(3) does not incorporate by reference or adopt the procedure for medical evaluation required by 29 C.F.R. § 1910.134(e) (2011). Therefore, our advice in this matter must be predicated upon the language and requirements of rule 4123:1-21-02(P)(3).

fighter's history of lung or pulmonary problems, including asbestosis, asthma, chronic bronchitis, emphysema, pneumonia, tuberculosis, silicosis, pneumothorax (collapsed lung), lung cancer, broken ribs, lung or chest area injuries or surgeries, or any other lung problem. The questionnaire further asks whether the fire fighter has any symptoms of lung or pulmonary illness, by inquiring whether under certain circumstances he experiences shortness of breath, coughing, wheezing, or chest pain.

Similarly, the questionnaire inquires of the fire fighter's history of cardiovascular or heart problems or history of cardiovascular or heart symptoms, which include heart attack, stroke, angina, heart failure, swelling in the feet or legs that is not related to walking, heart arrhythmia, high blood pressure, pain or tightness in the chest, irregular heart beating, and heartburn unrelated to eating. The questionnaire then asks whether the fire fighter takes any medication for pulmonary or cardiovascular conditions or seizures.

Whether the fire fighter has experienced any problems while wearing a respirator in the past, including eye or skin irritation, anxiety, weakness or fatigue, or any other issues that interfered with wearing a respirator is the next area of inquiry. The questionnaire then lists six questions that must be answered if the fire fighter wears a full-facepiece respirator or a self-contained breathing apparatus. Those questions consider the fire fighter's history of eye or vision problems, ear or hearing problems, back problems, and musculoskeletal problems.

The physician or health care professional may include other questions that are not included in the questionnaire or may include the questions listed in Part B of the questionnaire at his discretion. The questions in Part B concern the fire fighter's history of working in certain conditions. For example, Part B asks whether the fire fighter has worked in high altitudes and whether he experienced dizziness, shortness of breath, or pounding in his chest while working in that condition. The questionnaire also asks whether the fire fighter has ever been exposed to hazardous chemicals, either airborne or by skin contact. The fire fighter is asked whether he has ever worked with asbestos, silica, tungsten/cobalt, beryllium, aluminum, coal, iron, or tin, or in a dusty environment, or whether he has been exposed to any other hazardous materials. The fire fighter's prior occupations, other employment, hobbies, military service and exposure to biological or chemical agents, service on a HAZMAT team, and any other medication he has taken may also be considered. The questionnaire also asks about the equipment or protective clothing used with the respirators, the frequency and duration of the use of the respirator, the level of exertion required for the work performed, the conditions under which the fire fighter will work, and whether he will be exposed to any hazardous conditions or toxic substances while wearing the respirator. The questionnaire also inquires of any special responsibilities the fire fighter has while wearing the respirator that may affect the safety of others.³

It is apparent, therefore, that the OSHA questionnaire provides guidance about the type of information that is relevant to a physician's determination of whether a fire fighter shall be certified to use respiratory protection equipment. While the relevant factors identified are numerous and diverse,

³ The above references to the questionnaire are to 29 C.F.R. § 1910.134, Appendix C (2011).

the questionnaire does not indicate which factors are determinative. Rather, the physician or licensed health care professional considers all the relevant factors and uses his best professional judgment to reach a conclusion about a fire fighter's fitness to use respiratory equipment. The weight attributable to the individual factors, or whether one or a cluster of factors is dispositive of whether the fire fighter shall be certified to use the equipment, is a matter left to the professional judgment of the physician who undertakes the certification assessment.

The information a physician relies upon to complete the certification assessment may be obtained from the fire fighter through the use of the questionnaire, through the physician's examination of the fire fighter, or through the use of both processes. For example, prior to reaching a conclusion about the fire fighter's fitness, the physician may elect to rely exclusively upon the questionnaire completed by the fire fighter. In such a circumstance, the fire fighter will complete the questionnaire and submit his responses to the physician. It is then the responsibility of the physician, in reliance upon his experience and education, to evaluate the physical health and condition of the firefighter to determine whether the fire fighter shall be medically certified. Alternatively, the physician may choose to orally administer the questionnaire to elicit information from the fire fighter. After listening to and considering the fire fighter's responses to the questions, the physician will determine the fire fighter's fitness to use respiratory protection equipment. Finally, the physician may elect not to use the questionnaire and instead conduct a physical examination of the fire fighter.⁴ The physician will gather relevant data through the means he determines are necessary based on his education, experience, and professional judgment. Once the data are gathered, he will use his professional judgment to reach a conclusion about the fire fighter's fitness to use respiratory protection equipment.

For a basic illustration of these methodologies, we consider how a physician would gather information concerning the fire fighter's blood pressure. The physician may read the fire fighter's responses to the questions about blood pressure on the questionnaire, ask the fire fighter about his blood pressure, or measure the fire fighter's blood pressure using a sphygmomanometer (or blood pressure meter). Each of these three methods is acceptable under rule 4123:1-21-02(P)(3).

Accordingly, we conclude that rule 4123:1-21-02(P)(3) does not require the use of pass/fail criteria to determine whether a fire fighter shall be medically certified. In order to assess a fire fighter's fitness, the physician must consider the fire fighter's overall health, the environment in which the fire fighter will use the equipment, and the specific type of respiratory protection equipment being used. This evaluative process does not lend itself to rigid quantitative measurements. Rather, the determination is based upon a totality of factors that are evaluated by a physician using his education, experience, and professional judgment. The presence of certain physical health factors in a fire fighter or the requirement to work under certain environmental conditions may have a more detrimental

⁴ Although rule 4123:1-21-02(P)(3) does not state that the medical examination shall elicit the same information as the questionnaire, it is our understanding that the Bureau of Workers' Compensation reads the rule to require that, in a medical examination, a physician shall elicit the same information as the questionnaire.

effect on the health or performance of some fire fighters. Those same factors and conditions may have a less adverse effect on the health or performance of other fire fighters depending upon their particular physical condition.

By concluding that the determination of whether a fire fighter shall be medically certified under rule 4123:1-21-02(P)(3) is based upon the physician's use of his education, experience, and professional judgment instead of upon a set of pass/fail criteria, we are neither suggesting nor condoning the use of less stringent standards to evaluate a fire fighter's fitness to use respiratory protection equipment. As is the case with every evaluation of a patient by a physician, in the exercise of the physician's professional judgment, the patient's health must be of utmost concern to the physician. *See* American Medical Association Code of Medical Ethics, Principles of Medical Ethics, VIII, (June 2001) <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page?> (“[a] physician shall, while caring for a patient, regard responsibility to the patient as paramount”). *See also* American Medical Association Code of Medical Ethics, Opinion 10.015 (June 2001), <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion10015.page?#> (“[w]ithin the patient-physician relationship, a physician is ethically required to use sound medical judgment, holding the best interests of the patient as paramount”).

Conclusion

In sum, it is my opinion, and you are hereby advised that under 10A Ohio Admin. Code 4123:1-21-02(P)(3) (2010-2011 Supplement), a physician or licensed health care professional uses his education, experience, and professional judgment to determine whether a fire fighter shall be medically certified to use respiratory protection equipment. This determination is made by evaluating a fire fighter's health and physical condition by means of a medical examination of the fire fighter or the fire fighter's responses to the Occupational Safety and Health Administration questionnaire found in 29 C.F.R. § 1910.134, Appendix C (2011).

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General