

**United States Department of Labor
Employees' Compensation Appeals Board**

GERALD D. POTTER, Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Kansas City, MO, Employer**

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**Docket No. 05-1366
Issued: November 7, 2005**

Appearances:
Gerald D. Potter, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On June 13, 2005 the employee filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 24, 2005 which affirmed the denial of appellant's claim for an occupational disease. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue on appeal is whether appellant has met his burden of proof in establishing that he developed Lyme disease from Lymerix vaccinations received in the performance of duty.

FACTUAL HISTORY

On April 15, 2002 appellant, then a 58-year-old construction representative, filed an occupational disease claim alleging that he developed Lyme disease after receiving multiple Lymerix vaccinations while in the performance of duty. He became aware of his condition on March 13, 2002.

Appellant submitted an article detailing the Lyme disease risk assessment at Fort Leonard Wood, Missouri, where he worked from April 26 to May 2, 1992 which concluded that Fort Leonard Wood was a high risk work environment for acquiring Lyme disease. He submitted a supplemental statement on April 15, 2002 noting that he received Lymerix vaccinations commencing on September 13, 1999 and in August 2000 and tested positive for Lyme disease on March 13, 2002. He believed the vaccinations caused his Lyme disease and a resulting arthritic condition affecting his feet and knees. Dr. Sharon Anderson, a podiatrist, treated appellant for foot pain for seven years. She noted multiple ankle sprains and diagnosed hallux limitus on the left, arthralgias of the right ankle with disc joint narrowing of the metatarsal joint. Appellant sought treatment from Dr. Larry B. Marti, a Board-certified internist, who treated him for arthritis of the upper extremities and degenerative arthritis in both knees as a result of working on his farm. He was also treated by Dr. Charles L. Crist, a Board-certified family practitioner, on February 27, 2002 for foot and toe pain. He advised that appellant received three Lymerix vaccinations and thereafter developed arthritis and insomnia. Dr. Crist also noted that appellant sustained hundreds of tick bites while working at Fort Leonard Wood. An April 12, 2002 report from him diagnosed Lyme disease and advised that appellant experienced fatigue, insomnia, diminished mental capability, memory loss, general confusion and arthritis of the knees and left big toe. Laboratory studies advised that he tested positive for Lyme disease.

The employing establishment submitted a statement from Rex W. Ostrander, an engineer, dated April 29, 2002, who noted that the information appellant provided on his claim form regarding the alleged adverse affects of the Lymerix vaccination was accurate to the best of his knowledge. Mr. Ostrander advised that he had been appellant's supervisor since March 10, 2002 and did not have personal knowledge of events or actions prior to that time.

In a letter dated June 11, 2002, the Office advised appellant of the factual and medical evidence needed to establish his claim. In a letter of the same date, the Office requested additional information from the employing establishment regarding his claim of being bitten by hundreds of ticks while at work and inquired as to whether the Lymerix vaccinations were voluntary or a requirement of employment.

In a letter dated June 19, 2002, appellant indicated that he had a small farm where he raised cattle and that he had seen ticks on his property. Appellant indicated that he did not believe the Lymerix vaccine was a requirement of his employment and he received the vaccination voluntarily. However, he was unaware of the adverse affects of the vaccination. Appellant advised that the employing establishment did not screen employees for Lyme disease prior to the vaccination or follow the manufactures guidelines in giving the vaccinations. He worked as a construction representative at the employing establishment located at Fort Leonard Wood since July 1997 and was exposed to ticks when working outside and specifically noted a tick bite in May 2000. Appellant submitted an email to Joseph A. Graf, an officer at the employing establishment, dated March 18, 2002 and indicated that several coworkers experienced adverse reactions to the Lymerix vaccination and that the vaccine was removed from the market in February 2002. Mr. Graf advised that Lyme disease vaccinations were provided to employees as a part of a Lyme disease prevention program and that the employing establishment physician approved the vaccinations. He further noted that the Lymerix vaccination was discontinued because sales were not favorable. On March 25, 2002 the employing establishment ceased providing the vaccinations.

In a letter dated June 27, 2002, Mr. Ostrander noted that he was not aware of appellant sustaining a tick bite at work although he worked on projects in locations where ticks existed. Mr. Ostrander opined that during the past 5 years appellant spent 20 percent of his time outdoors where he was exposed to ticks. He advised that appellant accepted the Lymerix vaccination voluntarily.

In a decision dated August 7, 2002, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that his condition was caused by his employment duties.

By letter dated August 20, 2002, appellant requested an oral hearing before an Office hearing representative. He submitted a report from Dr. Crist dated August 10, 2002, who noted treating appellant for Lyme disease. He advised that two weeks after his third Lyme disease vaccine his symptoms commenced and rapidly progressed. Dr. Crist stated that appellant tested positive on the western blots test which revealed Lyme disease bacteria and other antibody responses consistent with Lyme disease bacteria. He opined that he had preexisting Lyme disease and that after receiving the Lyme disease vaccine appellant's symptoms became systematically worse. Dr. Crist noted that appellant exhibited many of the symptoms consistent with Lyme disease, including fatigue, memory loss, trouble concentrating and joint pain and affect his ability to work. He opined that it was more likely than not that the employer's requirement that appellant receive the Lyme disease vaccine caused his injury.

In a decision dated January 7, 2003, the hearing representative set aside the August 7, 2002 decision and remanded the case for further medical development. The hearing representative determined that Dr. Crist's report of August 10, 2002 was sufficiently rationalized to require further investigation as to whether the Lyme vaccination caused appellant's condition. The case was remanded for referral to a second opinion physician.

Appellant submitted statements reiterating his contention that his condition was caused by the Lymerix vaccinations he received at work. He also submitted reports from Dr. John M. Dailey, a podiatrist, dated August 20 to October 23, 1997, who noted treating appellant for pain and discomfort in both feet and diagnosed long plantar flexed third metatarsal left foot. Also submitted were reports from Dr. Marti dated January 12 to November 26, 2001, who treated him for bilateral knee pain and diagnosed degenerative medial meniscus in both knees, degenerative arthritis in his wrist and elbows, bursitis and tendinitis of the shoulder and knees.

On June 9, 2003 the Office referred appellant for a second opinion evaluation to Dr. David S. McKinsey, a Board-certified internist. In a report dated June 12, 2003, he reviewed the records provided to him and noted a work history with exposure to ticks and the Lyme vaccine. Dr. McKinsey opined that, although appellant experienced multiple somatic symptoms after receiving the Lyme vaccine, there was no clear-cut association between his symptoms and any vaccine toxicity. He noted that many of appellant's symptoms were consistent with a diagnosis of anxiety or depression, which was not associated with Lyme disease. Dr. McKinsey indicated that appellant showed no evidence of active Lyme disease and disregarded Dr. Crist's findings based upon the fact that Lyme disease was not documented in Missouri and false positives were well documented in the state.

In a decision dated July 8, 2003, the Office denied appellant's claim on the grounds that the weight of the evidence rested with the Office referral physician, Dr. McKinsey, who determined that appellant did not develop Lyme disease as a result of the Lymerix vaccination received in the performance of duty.

Appellant requested an oral hearing before an Office hearing representative. He submitted numerous articles on Lyme disease.

In a decision dated December 4, 2003, the hearing representative found a conflict in the medical evidence between Dr. Crist, who opined that appellant had Lyme disease and his condition was aggravated by the Lymerix vaccinations and Dr. McKinsey, who opined that appellant did not have Lyme disease and the Lymerix vaccination did not cause or aggravate appellant's current medical conditions. The hearing representative directed appellant's referral to an impartial medical specialist to resolve the existing conflict in opinion.

In a June 10, 2003 report, Dr. Anderson diagnosed multiple superimposed nerve compression of the peripheral nerves.¹ She opined that several conditions cause this type of neuropathy including Lyme disease, hyperinsulinemia, thyroid disorder protein abnormalities and vitamin deficiencies. In a report dated September 10, 2003, Dr. Sam T. Donta, a Board-certified internist, noted that appellant received three Lyme vaccinations from August 1999 to 2000. He noted an essentially normal physical examination but reported subjective findings of muscle weakness, myalgia and mild joint swelling of the right knee. Dr. Donta opined that appellant had a reaction to the Lyme vaccine which was associated with reactivation of prior Lyme disease. The laboratory tests revealed Western Blot reactions consistent with exposure to Lyme bacteria. Dr. Donta advised that the Lyme disease vaccination was removed from the market due to the serious reactions to the vaccine which were unanticipated. He noted that appellant was not disabled.

To resolve the conflict the Office referred appellant to a Dr. Michael B. Gutwein, a Board-certified internist. In a report dated February 13, 2004, he reviewed the medical records and diagnostic tests, including the report from Dr. Donta dated September 10, 2003. Dr. Gutwein noted an essentially normal physical examination with minimal deformities of the peripheral joints without swelling, discoloration or tenderness, deep tendon reflexes were normal and symmetric, plantar reflexes were downgoing bilaterally, normal sensation to touch in both great toes, no thyroid enlargement or tenderness, no neck mall, normal oropharynx, normal abdomen and neurologically appellant was oriented and cooperative. Dr. Gutwein noted that appellant's foot pains were consistent with bilateral tarsal tunnel syndrome rather than peripheral neuropathy and indicated that the joint symptoms commenced prior to receiving the Lyme vaccinations. He further noted that the positive serology obtained by Dr. Crist may have been related to Lyme disease but could be attributed to the Lymerix vaccine. Dr. Gutwein based this

¹ In a letter dated December 30, 2003, appellant requested to participate in the selection of the impartial medical specialist and requested that he be evaluated by a physician who was knowledgeable about Lyme disease and treats at least 12 patients with Lyme disease a year. In a letter dated January 22, 2004, the Office advised him of the criteria for participating in the selection of the impartial medical specialist. The Office noted that appellant's rejection of any specialist who has treated less than 12 Lyme disease cases per year was not acceptable reason and advised that the Office complied with the requirement that the referee physician be board certified.

assessment on the fact that appellant was also exposed to ticks on his farm, which may have also caused Lyme disease and which was not associated with his employment. The medical literature supported the possible occurrence of transient joint pain following the Lymerix vaccination; however, it does not support the chronic reactivation of preexisting Lyme disease caused by the vaccine as noted by Dr. Donta. Dr. Gutwein opined that appellant's chronic symptoms were compatible with conditions other than Lyme disease and appellant currently did not have evidence of active Lyme disease. He concluded that there was no evidence that appellant had peripheral neuropathy or Lyme disease cause by the Lymerix vaccine. Dr. Gutwein recommended additional tests. In a supplemental report dated March 1, 2004, he advised that the blood tests eliminated syphilis, rheumatoid arthritis, monoclonal gammopathy and HIV infection as the cause of appellant's complaints. Dr. Gutwein advised that the test for Lyme IgG antibody by EIA screening test was positive, possibly consistent with a past history of Lyme disease and the Lyme IgM by EIA antibody screening test was negative indicating that appellant did not have active Lyme disease. He advised that the tests for IgG and IgM antibodies by the immunoblot technique, which he believed to be the more definitive serologic tests, were both negative.

By a decision dated March 8, 2004, the Office denied appellant's claim, finding that the weight of the medical evidence, as provided by Dr. Gutwein, did not support that he developed Lyme disease secondary to the Lymerix vaccination received in the performance of duty.

On March 15, 2004 appellant requested an oral hearing before an Office hearing representative. The hearing was held on February 17, 2005. Appellant submitted duty status reports from Dr. Crist, which noted a diagnose of Lyme disease due to the Lymerix vaccinations and noted that appellant could return to work full time without restrictions. He also submitted treatment notes from Dr. Anderson noting her continued treatment of appellant for generalized pain and insomnia.

By decision dated May 24, 2005, the hearing representative affirmed the March 8, 2004 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or his claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that the injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.²

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual statement identifying employment factors alleged to have caused or contributed to the presence

² Gary J. Watling, 52 ECAB 357 (2001).

or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.³

ANALYSIS

The evidence supports that appellant had exposure to ticks at work and that he received Lymerix vaccinations at work. The Office reviewed the medical evidence and found that a conflict in medical opinion existed between Dr. McKinsey, who opined that appellant did not develop Lyme disease secondary to the Lymerix vaccinations and Dr. Crist, who opined that appellant's condition was caused by the Lymerix vaccinations received at work. As there was a conflict in the medical opinion evidence, the Office properly referred appellant for an impartial medical examination to Dr. Gutwein, a Board-certified internist.⁴

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁵

In a February 13, 2004 report, Dr. Gutwein reviewed appellant's history and the medical records and diagnostic tests, including the report from Dr. Donta dated September 10, 2003. Dr. Gutwein noted an essentially normal physical examination and opined that appellant's foot pains and joint symptoms commenced prior to receiving the Lyme vaccinations and, therefore, could not be attributed to the Lymerix vaccination. Dr. Gutwein further noted that the positive serology obtained by Dr. Crist may have been related to the Lyme disease but could not be attributed to the Lymerix vaccine. He based this assessment on the fact that appellant was also exposed to ticks on his farm, which also cause Lyme disease and which is not associated with his employment. Dr. Gutwein indicated that the medical literature did not support the chronic reactivation of preexisting Lyme disease caused by the vaccine as suggested by Dr. Donta. He opined that appellant's chronic symptoms were compatible with conditions other than Lyme disease and appellant currently did not have evidence of active Lyme disease. Dr. Gutwein

³ *Solomon Polen*, 51 ECAB 341 (2000).

⁴ 5 U.S.C. § 8123(a), in pertinent part, provides: "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."

⁵ *Id.*

concluded that there was no evidence that he had peripheral neuropathy or Lyme disease cause by the Lymerix vaccine. Upon additional testing, he advised that the tests for IgG and IgM antibodies by the immunoblot technique, which he believed to be the more definitive serologic tests, were both negative and, therefore, did not support a diagnosis of past or current Lyme disease.

The Board finds that the opinion of Dr. Gutwein is sufficiently well rationalized and based on a proper factual background such that it is entitled to special weight. His report established that appellant did not develop Lyme disease secondary to the Lymerix vaccination received in the performance of duty.

Appellant submitted a duty status reports from Dr. Crist which repeated the diagnoses of Lyme disease due to Lymerix vaccinations and noted that appellant could return to work full time without restrictions. While he reported that appellant had developed Lyme disease due to the Lymerix vaccinations received at work, Dr. Crist failed to provide a well-reasoned discussion explaining if and how, Lyme disease was causally related to appellant's workplace exposure. Without adequate explanation or rationale for the conclusion reached, this is insufficient to meet appellant's burden of proof.⁶ He also submitted treatment notes from Dr. Anderson, noting her continued treatment of appellant for generalized pain and insomnia. As noted, she neither provided a definitive diagnosis of his condition nor provided a well-reasoned discussion explaining how Lyme disease was causally related to appellant's workplace Lymerix vaccinations. Without any explanation or rationale for the conclusion reached, this is insufficient to meet his burden of proof.⁷ The reports from Dr. Crist and Dr. Anderson are insufficient to overcome that of Dr. Gutwein or to create a new medical conflict. Furthermore, Dr. Crist was on one side of medical conflict that Dr. Gutwein resolved such that his report, without new findings or rationale would be insufficient to create a new medical conflict.⁸

The Board finds that the opinion of Dr. Gutwein is sufficiently well rationalized and based upon a proper factual background such that it is the weight of the evidence and established that appellant's did not develop Lyme disease secondary to the Lymerix vaccination received in the performance of duty.⁹

⁶ *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

⁷ *Id.*

⁸ *See Dorothy Sidwell*, 41 ECAB 857 (1990).

⁹ As the medical evidence does not establish that appellant's voluntary vaccination at work caused Lyme disease, or any other medical condition, it is not necessary for the Board to consider applicability of Board precedent with regard to determining whether a claimant is entitled to compensation for complications from medical services rendered by the employing establishment for a nonemployment-related condition. *See Antoinette Anderson*, 43 ECAB 1054 (1992).

CONCLUSION

The Board, therefore, finds that appellant did not meet his burden of proof in establishing that he developed Lyme disease in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 24, 2005 is affirmed.

Issued: November 7, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board