U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TAMARA A. SMITH and DEPARTMENT OF THE NAVY, WASHINGTON NAVY YARD, Washington, D.C.

Docket No. 96-1830; Submitted on the Record;
Issued July 14, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

Appellant, a 35-year-old civilian historian, filed a claim on November 18, 1991 noting that she had been deployed to the Middle East (Kuwait, Bahrain and the United Arab Emirates) during Operation Desert Storm (from May 18 to June 13, 1991), and that since that time she had sustained skin lesions which were a disease caused by skin fly bites, and therefore causally related to her employment.

In a treatment note dated December 5, 1991, Dr. Gregory Martin, Board-certified in internal medicine and a fellow in infectious diseases at Bethesda Naval Hospital, stated that appellant had been in perfect health until returning from the Persian Gulf in June 1991, when she contracted a nonproductive cough and sore throat for two weeks. Dr. Martin stated that in August 1991 appellant developed a large, painful "pimple" on her nose which was drained and emitted a large amount of thick white pus and then healed, leaving a large hole that filled in with scarring. Dr. Martin stated that appellant developed two more lesions in September 1991; one over her right Achilles tendon and one in her left groin area. Dr. Martin stated that both of these lesions also drained thick white pus. Dr. Martin concluded that her diagnosis based on examination "seems very unlikely due to leishmania, which are caused by sandflies usually found in the interior and close to ground," and indicated that active lesions almost always reveal leishmaniasis organisms if the patient has any.

An Office medical adviser stated in a case review note dated March 8, 1992 that "although definite diagnosis given, the probable diagnosis is leishmaniasis."

By letter dated March 10, 1992, the Office accepted appellant's claim for leishmaniasis.

In a letter to the Office dated January 26, 1994, appellant stated that she was enclosing two medical bills for treatment related to her employment-related condition and noted that she had hitherto not needed to submit any such bills because her employing establishment had been treating her for her illness continuously since the date of injury (November 18, 1991). Appellant stated, however, that despite two years of treatment she had been getting progressively sicker, that due to cutbacks at the employing establishment it had imposed increasing restrictions on treatment of civilians in military hospitals and that she had been forced to seek private treatment for her disease. Appellant further advised that due to these cutbacks, the employing establishment had informed her that her current contract as a historian would not be renewed after July 31, 1994.[1] Appellant stated that her current treating physician, Dr. Lawrence J. Eron, Board-certified in internal medicine and a specialist in infectious diseases, believed that the employing establishment's physicians may have misdiagnosed her condition in 1991 as leishmaniasis, while appellant might actually be suffering from chronic fatigue syndrome, in addition to a related immune deficiency causing the skin lesions as well as her chronic illnesses, infections, fatigue, fevers and muscle and joint problems.[2] Appellant therefore requested the Office whether she could continue to file her medical bills for treatment of these symptoms under the original diagnosis of leishmaniasis even if her current treating physician believed she might be suffering from an entirely different illness.

In response to appellant's January 26, 1994 letter, the Office stated in a letter to appellant dated February 18, 1994 that:

> "You may continue to file medical bills under the accepted condition of leishmaniasis. If your treating physician believes you have chronic fatigue syndrome he or she should provide a well-reasoned opinion, supported by medical rationale, as to how your condition is related to the original accepted condition. *Once this office has accepted a condition payment of bills relating to treatment is ongoing unless the medical evidence shows no further treatment is necessary.* [Emphasis added]. If you become unemployed because of the accepted condition you may be entitled to claim compensation. If your contract is not renewed and your doctor provides medical evidence to support the fact that you cannot work because of your condition, you may also be entitled to claim compensation."

[1] Appellant subsequently asserted that her contract was not renewed by the employing establishment in September 1994 because of her "inability to complete the work assigned to her."

[2] In a December 16, 1993 report, Dr. Eron noted that appellant had been suffering from recurrent skin lesions and a fatigue syndrome since she went to the Persian Gulf in 1991, and opined that appellant had a fatigue syndrome rather than leishmaniasis.

Appellant subsequently submitted to the Office a March 10, 1994 report from Dr. Eron, who stated:

> "I have been following [appellant] since December 16, 1993 for what is presumed to be "Gulf War Syndrome." This diagnosis is based on the fact that fatigue and cognitive difficulty along with recurrent flu-like symptoms including myalgias, arthralgias, headache, cough, sore throat, painful lymph nodes, blurred vision, numbness, etc. began shortly after her return from the Gulf where she served in Operation Desert Storm. This was initially diagnosed by [employing establishment] physicians as possible leishmaniasis, based on the fact that she had some skin lesions. I am unable to make that diagnosis at this time and feel that in all probability this was the beginning of her "Gulf War Syndrome", the cause of which of course is unknown. As you know this topic is being currently investigated by the Armed Forces and we're hopeful that the exact cause may be pinned down in the near future."

On July 5, 1994 appellant filed a Form CA-7 claim for compensation based on wage loss from June 12 to 26, 1994 and subsequently submitted two Form CA-8 claims for continuing compensation dated July 19 and August 8, 1994, seeking compensation from June 26 to July 9, 1994 and from July 10 to July 23, 1994.

In a letter dated October 12, 1994, appellant stated that she was enclosing medical records in support of her claim from a Veterans Administration hospital.

In a note dated October 21, 1994, an Office medical adviser reviewed appellant's medical records and current medical literature pertaining to Gulf War Syndrome, referring to appellant's claim for continuing compensation based on Gulf War Syndrome, stated that "there is no definitive disease entity at this time."

By decision dated November 9, 1994, the Office denied appellant claims for compensation based on wage loss commencing June 12, 1994. The Office found that the evidence of file failed to demonstrate that appellant was disabled from work as a result of her November 18, 1991 employment injury.

In a letter dated November 15, 1994, appellant requested reconsideration of the Office's decision. Appellant did not submit any new medical evidence in support of her request.

In another letter submitted to the Office on November 15, 1994, appellant stated that she was troubled by the fact that the Office was apparently changing the definition of her original, accepted diagnosis of leishmaniasis. Appellant asserted that leishmaniasis was not a skin condition, but a parasitic infection, and she enclosed letters from the Office which corroborated this definition. Appellant stated that the specific strain of leishmaniasis resident in Kuwait in 1991 was only recently defined as "viscerotropic."

By decision dated November 23, 1994, the Office denied appellant's request for reconsideration, finding that the evidence submitted was of an immaterial nature and was not sufficient to warrant modification of its prior decision. The Office noted that appellant's case

had never been closed, that the claim was accepted for leishmaniasis and remained open to pay bills related to this accepted condition. The decision denying compensation dated November 9, 1994 was for the claim of lost wages effective June 12, 1994 and continuing, as she had not submitted medical evidence to support that her disability was due to the accepted condition [leishmaniasis] and not Gulf War Syndrome, which was not an accepted condition of the instant case.

In a letter dated April 28, 1995, the Office advised appellant that it was responding to her November 15, 1994 letter to President Clinton. The Office stated that appellant's treating physician, Dr. Eron, had indicated in his December 16, 1993 and March 10, 1994 reports that she did not have leishmaniasis, and that it would be issuing a formal decision within the next two weeks concerning her entitlement to continued medical treatment for this condition.

In an April 28, 1995 letter, appellant challenged Dr. Eron's opinion that she did not have leishmaniasis.[3] Accompanying this letter was a February 1, 1995 consultation report from Dr. C.A. Ohl, Board-certified in internal medicine and infectious disease. He stated:

> "Cannot rule out viscerotropic leishmaniasis -- although she currently does not have any subjective or objective evidence for active illness, there was potential exposure to the vector and certain elements of her early illness (fever, weight loss, cyclic constitutional symptoms, and possible adenopathy) are suggestive but by no means specific. Current testing has not proven sensitive enough (serology) for rx of current or present infection and skin testing for leishmaniasisis). Tropic is not available. Bone marrow or other invasive testing is not indicated at this time. [Appellant] agrees postural skin lesions described would be very atypical for leishmaniasis. *No evidence of active infection due to agents endemic to SW Asia at this time.*" [Emphasis provided by physician.]

By decision dated May 11, 1995, the Office found that appellant was no longer entitled to medical treatment as of May 10, 1995 and continuing as a result of her accepted condition of leishmaniasis. The Office stated that it had originally based its acceptance on the diagnosis of leishmaniasis made by the employing establishment's physicians, but that Dr. Eron, her treating physician, had subsequently opined in his December 16, 1993 and March 10, 1994 reports that appellant was suffering from fatigue syndrome, not leishmaniasis.

In a letter dated December 4, 1995, appellant requested reconsideration of the Office's May 11, 1995 decision. Appellant noted that relevant medical evidence, including Dr. Ohl's

[3] In her letter appellant stated that she applied for benefits in November 1992 [sic] "at the urging of these doctors who had treated me since my return [from the Persian Gulf], whose diagnosis was *R.O. (Rule Out) Leishmaniasis*.

February 1, 1995 report, had not been addressed by the Office in its previous decision, although she claimed she had delivered copies of this evidence by May 5, 1995.[4]

On March 15, 1996 the Office, denied appellant's request for reconsideration on the ground that the evidence appellant submitted in support of her request was not sufficient to require the Office to review its prior decision. The Office noted that appellant had resubmitted Dr. Ohl's report which, it acknowledged, had not been previously addressed in the May 11, 1995 decision, but noted that this report was not in conflict with the May 11, 1995 decision in that appellant no longer had active leishmaniasis and no longer required treatment for it.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

The only decision before the Board on this appeal is the March 15, 1996 Office decision which found that the evidence submitted in support of appellant's request for reconsideration was insufficient to warrant review of its prior decision. Since the March 15, 1996 decision is the only decision issued within one year of the date that appellant filed her appeal with the Board, May 14, 1996, this is the only decision over which the Board has jurisdiction.[5]

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[6] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[7] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[8]

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law, and has not advanced a point of law or fact not previously considered by the Office. The issue in this case is medical in nature. However, appellant, as noted above, did not submit any new and relevant medical evidence in support of her request for reconsideration of the Office's May 11, 1995 decision denying compensation. All the medical evidence submitted by appellant had previously been considered by the Office in reaching prior decisions. The February 1, 1995 report of Dr. Ohl, although stating that a diagnosis of leishmaniasis could not be ruled out, clearly indicated that she currently did not have any subjective or objective evidence for active illness, that current testing had proven insufficiently

[4] Appellant also submitted results of neurological, radiological and other diagnostic tests she underwent in March 1995.

[5] *See* 20 C.F.R. § 501.3(d)(2).

[6] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.138(b)(2).

[8] *Howard A. Williams,* 45 ECAB 853 (1994).

sensitive for current or present infection, and that there was no evidence of active infection due to agents endemic to southwest Asia at that time. Appellant generally contended in her December 4, 1995 letter that she still suffered from residuals of her exposure to pathological elements during her May 18 to June 13, 1991 tour in the Persian Gulf, but failed to support this contention with new and relevant medical evidence.[9] Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

The March 15, 1996 Office of Workers' Compensation Programs' decision is affirmed.

Dated, Washington, D.C.
July 14, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[9] The Board notes that -- as appellant stated in her May 4, 1995 letter -- the Office assigned her the diagnosis of leishmaniasis despite the fact that the employing establishment physicians at Bethesda Naval Hospital who initially examined and treated her for her skin disease had ruled out a diagnosis of leishmaniasis. In fact, the record is devoid of any medical opinion containing a definitive diagnosis of leishmaniasis causally related to factors of employment and based on a rationalized, probative medical opinion.