

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DARLA K. IBAROLA and PEACE CORPS,  
VOLUNTEER SERVICES, Washington, D.C.

*Docket No. 97-2180; Submitted on the Record;  
Issued June 15, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Worker's Compensation Programs abused its discretion in denying appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for review.

On March 17, 1993 appellant, then a 28-year-old peace corps volunteer, filed an occupational disease claim alleging that she contracted Epstein-Barr virus while stationed in Paraguay, South America. Appellant was hospitalized in Paraguay during January 1993 for complaints of fatigue, shortness of breath and a dry cough. She returned to Washington, D.C. for treatment with Dr. Alan W. Stone, a Board-certified internist. In a clinical summary dated April 12, 1993, Dr. Stone opined that appellant suffered from chronic fatigue due in part to an Epstein-Barr viral infection with a component of anxiety causing her shortness of breath. The Office accepted the claim for panic disorder and upper airway congestion as a result of Epstein-Barr Virus. Appellant received compensation for total loss of wage-earning capacity effective March 17, 1993. She was placed on the periodic rolls for disability compensation effective August 7, 1993.

In a June 2, 1993 attending physician's report (Form CA-20), Dr. Stone diagnosed chronic fatigue, cause unknown, recent Epstein-Barr viral infection and anxiety. He indicated that he was uncertain when appellant could return to work. Dr. Stone also noted that appellant was discharged from his care.

The Office referred appellant for a second opinion evaluation with Dr. Wayne F. Keller, a Board-certified psychiatrist, on September 2, 1993. Dr. Keller diagnosed chronic fatigue syndrome due to Epstein-Barr virus and dysthymic disorder with anxiety and panic features. He opined that appellant could return to work when she was recovered from chronic fatigue

syndrome and depression, but Dr. Keller noted that she had not recovered from those conditions at the time of his examination.

Dr. Keller referred appellant to Dr. John R. Pack, a Board-certified psychiatrist. In a series of reports dated October 27 and November 24, 1993 and January 12, 1994, Dr. Pack, diagnosed depression for which he prescribed medication. He did not discuss the origin of appellant's condition.

On May 3, 1995 the Office referred appellant to Dr. John S. Meyer, a Board-certified neurologist, for an evaluation as to whether appellant had any continuing disability related to her accepted condition.

In a May 31, 1997 report, Dr. Meyer noted appellant's employment and medical histories, including her treatment for Epstein-Barr infection. According to him, appellant's symptoms related to the Epstein-Barr virus were resolved. Dr. Meyer diagnosed severe depression and anxiety which he opined were endogenous and not related to appellant's employment. He noted that appellant was pregnant at the time of her May 25, 1995 examination, and recommended that her treatment for depression resume after delivery. Dr. Meyer further opined that appellant could return to work in mid September 1995.

On July 3, 1995 the Office issued a notice of proposed termination of compensation and advised appellant that she had 30 days to submit additional medical evidence.

In a letter dated July 13, 1995, appellant requested that the Office contact the office of her former treating physician, Dr. Robert Henley, a family practitioner, to obtain her medical records. Appellant further advised that she was to be examined by another physician in the next two to three weeks.

An Office call report dated July 26, 1995 noted that appellant was contacted and informed that the Office had been unable to obtain the medical records from Dr. Henley's office as his staff preferred to obtain the request directly from appellant and release the documentation to appellant only.

By decision dated August 7, 1995, the Office terminated appellant's compensation effective August 19, 1995 on the grounds that the medical evidence established that the work-related injury had ceased.

Appellant requested a review of the written record on August 16, 1995. Appellant submitted treatment notes, dating from July to October 1994, which she stated were from Dr. Henley, although his name was not listed on any of the notes. The treatment notes listed a history of chronic fatigue syndrome for which appellant was prescribed medication. There was no diagnosis or physical findings provided.

Appellant also submitted a July 31, 1995 progress report from Dr. Gilbert Manso, a Board-certified family practitioner. Dr. Manso noted that appellant presented with complaints of multiple symptoms including foggy memory, constipation, exhaustion, shortness of breath, drowsiness and headache. He indicated that appellant was depressed due to the stress of raising

children. Dr. Manso concluded that appellant “acquired the Epstein-Barr virus, chronic fatigue syndrome, anxiety disorder and candida while working on the job. She is not able to work now and the date of her return is not clear yet.”

In a decision dated December 7, 1995, an Office hearing representative reviewed all of the evidence of record and affirmed the Office’s August 7, 1995 decision terminating compensation.

On July 24, 1996 the Office received appellant’s request for reconsideration dated July 17, 1996.

In support of her request, appellant submitted an August 4, 1995 report addressed to Dr. Manso from Dr. Paul C. Eck.<sup>1</sup> Dr. Eck stated that a “perusal of [appellant’s] tissue mineral analysis test reveals mineral level and ratio imbalances which may be contributing to her current listed symptoms.” He noted that appellant had steep fluctuations in her sugar levels, problems in the digestion of carbohydrates and a sluggish thyroid often associated with energy loss. Dr. Eck suggested that appellant’s anxiety and muscle weakness may be due to a high sodium/low potassium ratio. He further noted that appellant had a low iron level which could be attributable to her recurrent infections and poor response to antibiotic therapy, a low iron level associated with fatigue, and a low magnesium level commonly associated with mental confusion. Dr. Eck concluded that improvements in appellant’s mineral levels should improve her negative feelings about life.

Appellant also submitted a July 12, 1996 report from Dr. Manso which noted appellant’s history of injury and her symptoms of foggy memory, constipation, exhaustion, allergies, shortness of breath upon exertion, drowsiness, decreased libido, decreased memory, headache and weakness. He indicated that appellant felt more depressed with increased anxiety and nervousness. Dr. Manso specifically stated that “[n]o specific finding or [laboratory] abnormality has been found and no diagnosis is certain. Appellant’s symptoms continue as she has been unable to follow any therapeutic or diagnostic recommendations due to her lack of funds and energy.”

In a decision dated October 18, 1996, the Office performed a limited review of the evidence submitted on reconsideration and denied appellant’s request for merit review.

The only decision before the Board in this appeal is the Office’s decision dated October 18, 1996 denying appellant’s request for merit review. Since more than one year had elapsed between the date of the Office’s most recent merit decision dated December 7, 1995 and the filing of appellant’s appeal on June 19, 1997, the Board lacks jurisdiction to review the merits of appellant’s claim.<sup>2</sup>

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<sup>1</sup> The report was not on letterhead and Dr. Eck’s credentials were not identified in the report. The Board notes that there is no listing for Dr. Eck in the American Medical Association, *Directory of Physicians in the United States* (35th ed. 1996).

<sup>2</sup> 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office’s final decision being appealed.

Section 8128(a) of the Federal Employee's Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.<sup>3</sup> The Office, through its regulations, has imposed a one-year time limitation for a request of review to be made following a merit decision of the Office.<sup>4</sup> The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>5</sup> When 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.<sup>6</sup> 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.<sup>7</sup> Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.<sup>8</sup> Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.<sup>9</sup>

In the instant case, appellant did not show that the Office erroneously applied or interpreted a point of law and did not advance a point of law or fact not previously considered by the Office. In support of her request for reconsideration, appellant submitted reports from Drs. Eck and Manso. In his August 4, 1995 report, Dr. Eck suggests that appellant's continuing symptoms were related to a chemical imbalance. Because Dr. Eck did not discuss appellant's condition in relation to her federal employment, and he offered no opinion as to whether appellant was disabled from work, his report is not relevant to the issue of whether appellant's accepted conditions have resolved. Likewise, Dr. Manso's opinion is not relevant evidence to support appellant's request for merit review since he admitted that he found "no specific physical finding or [laboratory] abnormality," and he stated that he was unable to provide a diagnosis for appellant's symptoms. Consequently, the evidence submitted by appellant did not meet the requirements set forth at 20 C.F.R. § 10.138.

The Board has held that the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction

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<sup>3</sup> 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2).

<sup>5</sup> 20 C.F.R. § 10.138(b)(1).

<sup>6</sup> *Id.* at § 10.138(b)(2).

<sup>7</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

<sup>8</sup> *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>9</sup> *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

from established facts.<sup>10</sup> Such was not the case here, and the Board finds that the Office properly denied appellant's application for reconsideration of this claim.

The decision of the Office of Workers' Compensation Programs dated October 18, 1996 is hereby affirmed.

Dated, Washington, D.C.  
June 15, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>10</sup> See *Daniel J. Perea*, 42 ECAB 214 (1990).