

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

ROBERT M. MERRITT, Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
ELECTRONICS SUPPLY CENTER,
Columbus, OH, Employer**

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**Docket No. 03-1849
Issued: June 3, 2004**

Appearances:
Robert M. Merritt, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 15, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated August 7, 2002 and March 13, 2003 which denied his claim finding that he did not have any peripheral neuropathy and that his worsening bipolar disorder was not causally related to his employment exposure to toxic chemicals. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained neurotoxicity, peripheral neuropathy or a worsening of his preexisting bipolar disorder, causally related to factors of his federal employment.

FACTUAL HISTORY

On February 23, 1999 appellant, then a 37-year-old electronics technician, filed an occupational disease claim alleging that he had been sick for a long time with brain damage, and

had seen several physicians for loss of brain function due to the chemicals around which he worked.¹

From appellant's medical history of record, it is apparent that he had suffered from mental disorders since the age of 23. Appellant, however, alleged that for the preceding 12 years he had worked in a laboratory in Dayton where he did multiple tests involving "thousands of parts" and at least "a hundred chemicals," and was the safety person for the laboratory who had to clean up chemical spills. He claimed that the air exchange was very poor, that the hoods were not effective, and that people used chemicals without ventilation, and indicated that he believed these activities resulted in toxic exposures. Appellant implicated exposure to lead solder, adhesives, solvents, epoxy dust, metal and plastic dusts, nitric acid, sodium hydroxide, ferric chloride, isopropyl alcohol, Krylon, other caustics and acids and other chemicals, as causing many of his ailments such as sleep disorders, emotional instability, disorientation, intestinal problems and bipolar behavior. The employing establishment provided appellant's job description and many material data sheets regarding the chemicals found in his workplace, to which he might have been exposed.

By report dated January 15, 1999, Dr. Bernard M. Kuhr, a Board-certified psychiatrist, noted that he had treated appellant since September 23, 1998, and that since 1995 he had had chronic depression with brief periods of mania which were not psychotic. Dr. Kuhr diagnosed bipolar disorder, depressed without psychosis, and he prescribed medication and therapy.

On February 22, 1999 the Office referred appellant, together with a statement of accepted facts and questions to be addressed, to Dr. Lee Howard, a clinical psychologist.

By report dated February 26, 1999, Dr. Kevin D. Arnold, a clinical psychologist, forwarded a report of the same date to Dr. Kuhr noting that appellant's younger years were socially troublesome, that he had been treated since 1985 by five physicians for emotional problems, including anxiety, withdrawal, tension, irritability, insomnia, fatigue, that he was currently taking Lithium and that "[I]f the neuropsychological assessment reveals deficits due to toxic exposure, he would need to be placed in psychotherapy for development of coping skills."

On March 10, 1999 Dr. Kuhr diagnosed appellant as having bipolar disorder, mixed, with history of auditory and visual hallucinations, and a cognitive disorder with psychological/cognitive findings typical of effects of exposure to toxins.

On June 10, 1999 appellant underwent a comprehensive psychological examination that included neuropsychological testing with Dr. Howard. The testing was reported as demonstrating results that "may be positive for the presence of organic brain dysfunction, although it is interpreted cautiously as there are indications that effort may be marginal and/or not optimal." The testing physician, Dr. Howard, noted that, although appellant reported having toxic exposure to chemicals at work, the presence of a long-term bipolar disorder was a significant confounding factor. He noted that appellant's brain magnetic resonance imaging

¹ The Office, however, developed appellant's claim as a claim for an emotional condition rather than a claim for chemically-induced or aggravated brain damage.

(MRI) scan was reported as negative, with not even mild findings to support his subjective complaints. Dr. Howard opined as follows:

“It cannot be concluded with reasonable or normal psychological/psychiatric probability that there is a cognitive disorder not otherwise specified secondary to the toxic exposure. There is the significant and problematic factor that he suffers from a bipolar disorder which could mimic the cognitive symptoms. There is also some indication that some of the potential organic symptoms may be under psychological volition as opposed to organic causality. Further note that the deterioration curve reported appears to be inconsistent with the history of exposure.

“Thus, the cognitive symptoms appear to be a function of a bipolar disorder and/or some other unrelated and undiagnosed neurological event.

“There is impairment present associated with the bipolar disorder which [h]as a genetic and/or biochemical etiology and [is] not related to the toxic exposure.”

By decision dated July 12, 1999, the Office rejected appellant’s claim finding that the evidence of record did not establish any causal relationship between his medical and psychiatric complaints and factors of his federal employment. The Office found that there was no evidence that appellant’s cognitive disorder was secondary to employment factors. The Office performed a compensable factor of employment analysis, and found that it was accepted that appellant worked with chemicals and that ventilation was within regulations. It was accepted that the toolroom had a sink where appellant used adhesive glues and solvents and was exposed to fine sawdust, plastic dust, metal dust, epoxy dust, solvents and glues. The Office accepted that in working with microcircuits appellant was required to strip wires and solder and clean boards, that he was exposed to solder smoke and fumes from melted wire insulation, and that he worked with copper boards which were covered with photosensitive chemicals which he etched with a solution of sodium hydroxide and ferric chloride. The Office accepted that he then cleaned the boards with isopropyl alcohol and a nitric acid solution, and that over a period of 8 years he built 7 mother boards and 10 miscellaneous boards in 1988; 16 daughter boards in 1989 and 19 custom boards in 1991. The Office accepted that appellant was assigned as the laboratory safety monitor and from time to time dealt with a small amount of chemicals stored in the fume hood, that he was required to work with liquid nitrogen, and that in November 1995 he was exposed to sulfuric acid fumes which forced the evacuation of the laboratory, when he was called in to assist with the situation. Thereafter the laboratory was moved from Dayton to Columbus, Ohio sometime in 1996, and appellant had less exposure to chemicals. The Office accepted that he built some circuit boards and cleaned these boards with epoxies and contact cleaner, and that his exposure to epoxies and contact cleaners were considered to have arisen out of the course of his regular day-to-day activities.

The Office found that appellant’s belief that safety precautions were ignored in the new laboratory was not in the performance of duty. It found that appellant’s reaction to the move to Columbus and his dissatisfaction with the installed ventilation system constituted his desire to work in a particular environment and was not compensable. Appellant’s dissatisfaction with the management and the ongoing privatization of the laboratory and his possible loss of a job were

found not to be compensable factors of employment. The Office found that fears regarding these were self-generated.

By letter dated August 9, 1999, appellant requested an oral hearing before an Office hearing representative.

A hearing was held on February 17, 2000 at which appellant testified. In support of his testimony, appellant submitted a neuropsychological testing analysis from Dr. Lisa Morrow, a clinical psychologist, who concluded that in many areas appellant's performance was significantly less than expected, and many fell in the "impaired" range. She recommended documentation of exposure with material data sheets from the employer. Appellant also submitted his job description and employing establishment material data sheets for consideration.

In support of the hearing, appellant submitted a January 24, 2000 report from his family practitioner, Dr. Bryan Beggin, an osteopath, who opined that there appeared to be an association between appellant's symptoms and his employment exposures. Dr. Beggin concurred with Drs. Arnold and Morrow that "there [was] a causal relationship between [appellant's] employment and the handling of potentially hazardous chemicals and his current condition."

Also submitted was a February 9, 2000 report from Dr. Allene J. Scott, a Board-certified environmental medicine specialist, in which she noted that neurodiagnostic testing as well as quantitative both revealed abnormalities. Dr. Scott reviewed the material safety data sheets and noted that they confirmed the use of solvents, organic flux remover, methylene chloride, lead solder, acetone and mineral spirits, the exposure to which could lead to both central and peripheral neurotoxicity. Dr. Scott opined that appellant had cognitive deficits not accounted for by the bipolar disorder, but she noted that his balance problems indicated a possible vestibular dysfunction. She opined that, although appellant's bipolar disorder was not due to exposure to chemicals, his depressive symptomatology was associated with toxic encephalopathy which was likely aggravated by toxic exposures.

By decision dated May 10, 2000, the hearing representative set aside the July 12, 1999 decision and remanded the case to resolve a conflict in medical evidence between appellant's physicians, Drs. Arnold, Beggin, Morrow and Scott, who supported appellant's claim of employment-related or aggravated brain damage to various degrees, and the Office second opinion specialist, Dr. Howard, a clinical psychologist, who opined that appellant's conditions were unrelated to work exposure.

On September 5, 2000 the Office referred appellant, together with a statement of accepted facts and the relevant case record, to Dr. Robert A. Borstein, a clinical psychologist, for an impartial medical opinion to resolve the existing conflict as to whether appellant had a cognitive dysfunction related to exposure to toxins at work and whether his current depression was aggravated by the implicated toxic factors of employment.

By report dated November 15, 2000, Dr. Borstein reviewed the statement of accepted facts and appellant's factual and medical/psychologic history, he conducted testing in his laboratory and treatment milieu, and noted that the results revealed a broad pattern which was

somewhat more prominent on measures of nonverbal ability, concept formation and scattered motor and sensory abnormalities. Dr. Borstein noted that, in comparison to previous examinations, appellant's memory appeared to be somewhat improved, but his performance on measures requiring motor speed appears to be somewhat worse. He opined that appellant's cognitive disorders were not directly related to the reported toxic exposure but that his motor deficits appear to be in part related to the toxic exposure. Dr. Borstein noted that the report of Dr. Scott indicated evidence of peripheral neuropathy that was consistent with toxic exposure. He stated that, assuming that no other etiologies for the peripheral neuropathy have been identified, it was reasonable to conclude that some component of his motor slowing was related to peripheral neurologic dysfunction related to the reported toxic exposure. Dr. Borstein noted, however, that appellant's efforts with motor speed and dexterity testing had consistently deteriorated from the initial February 1999 evaluation. He noted that appellant's bipolar affective disorder and anxiety disorder were not caused by the apparent exposure to toxic chemicals and predated his employment in positions involving exposure to these chemicals. Dr. Borstein also noted that one could not conclude that these disorders were aggravated by possible exposures. He noted that appellant did not have cognitive symptoms until the laboratory moved to Columbus and that, following that move, his exposure to these chemicals was less, with significant periods of employment being without exposure. Dr. Borstein noted that appellant's increase in symptoms occurred at a time when his exposure to neurotoxic chemicals was reduced, and therefore he concluded that exposure to such chemicals did not cause or aggravate his bipolar disorder. He also noted that the progression of his bipolar disorder was the explanation for his cognitive and emotional symptoms.

By decision dated January 26, 2001, the Office denied appellant's claim finding that Dr. Borstein's opinion constituted the weight of the medical evidence, and had resolved the existing conflict in the medical evidence and it found that appellant's bipolar symptomatology worsened as his exposure to toxic chemicals had lessened, such that they were not related.

By letter dated February 23, 2001, appellant, through his representative, requested a review of the written record and claimed that he was not tested for lead from soldering in the bones, or for peripheral neuropathy, or for other residual toxins in the brain or elsewhere.

By letter dated July 27, 2001, the Office requested that Dr. Borstein answer whether or not appellant's peripheral neurological dysfunction was caused by exposure to toxic chemicals as claimed.

In a letter dated August 6, 2001, Dr. Borstein responded to the July 27, 2001 Office letter by noting that "the diagnosis of the etiology of peripheral neuropathy is outside my area of expertise."

By letter dated October 29, 2001, the Office confirmed that the etiology of a peripheral neuropathy was beyond the area of expertise of Dr. Borstein; however, the Office then requested clarification of Dr. Borstein's opinion on that very issue.

After no further response was forthcoming from Dr. Borstein, by decision dated November 21, 2001, the Office denied appellant's claim finding that Dr. Borstein "did not

disavow his conclusion that appellant's condition was caused by deterioration of his bipolar disorder."

In a letter dated December 5, 2001, appellant requested reconsideration and he argued that there was no relationship between organic peripheral neuropathy and the psychiatric diagnosis, bipolar disorder, and wondered why the Office would deny a claim based on the opinion of a psychologist who had admitted that he was not medically qualified to opine on the issue.

A review of the written record was then conducted by an Office hearing representative.

By decision dated May 14, 2002, an Office hearing representative found that the case was not in posture for decision because the impartial medical examiner, a psychologist, was not able to clarify his opinion on the medical issue of whether appellant had employment-related peripheral neuropathy.

In a letter dated June 12, 2002, the Office referred appellant, together with a statement of accepted facts and the relevant case record, to Dr. Ronald R. Wade, a Board-certified neurologist, for another impartial medical opinion to resolve the conflict on the medical issues of whether appellant had a toxic exposure-related cognitive dysfunction, and whether he had a toxic exposure-related peripheral neuropathy.

By report dated July 25, 2002, Dr. Wade reviewed appellant's factual and medical history, noted that he had trouble seeing peripheral objects, had migraine headaches, frequently felt disoriented and depressed and felt that his symptoms were getting worse, noted that he was unable to ride a bike, and noted that he could not drive more than 10 miles, tolerating traffic poorly. Dr. Wade conducted a physical examination and noted that appellant was quite tremulous but had no cogwheel rigidity, no atrophy, no fasciculations, no myotonia, no Froment's sign, no organic shoulder weakness and no pathologic reflexes. Dr. Wade found nothing to suggest frontal lobe release signs and opined that appellant's neurologic examination did not reveal a neuropathy or encephalopathy. He noted that quantitative sensory testing provided nowhere near sufficient data to evoke a diagnosis of peripheral neuropathy. Dr. Wade further noted that nowhere in the record did he find electromyogram testing results or nerve conduction velocity study results to detect motor or sensory nerve dysfunction, and clinically he had none. Dr. Wade noted that neither Dr. Morrow nor Dr. Borstein described peripheral nerve disorders but rather diagnosed a major depressive episode, a hypomanic episode, a bipolar disorder and a panic disorder with agoraphobia, and noted that appellant's laboratory results were normal. He indicated that Dr. Beggin's report raised the possibility of encephalopathy but that was not confirmed, he summarized that appellant's neurological examination did not show any evidence of either an encephalopathy, regardless of cause, or a neuropathy due to any intrinsic or extrinsic agent.

Dr. Wade also completed a Form OWCP-5c work capacity evaluation indicating that appellant could work eight hours per day without restrictions.

By decision dated August 7, 2002, the Office denied modification of the prior decision finding that the weight of the medical evidence consisted of the reports of Dr. Wade on the issue of peripheral neuropathy, and Dr. Borstein on the issue of bipolar disorder and established that appellant did not have a clinical peripheral neuropathy that was worsened by any employment factor and had a nonemployment-related bipolar disorder.

Appellant disagreed with the August 7, 2002 decision and he submitted another report and requested review.

In a January 28, 2003 report, Dr. J.T. Spare, a Board-certified psychiatrist, noted that bipolar symptomatology had certainly been reported in concert with a variety of neurologic injuries and that this might explain what happened to be hypomania in his case.

By decision dated March 13, 2003, the hearing representative affirmed the prior decision finding that the weight of the medical evidence of record supported that appellant did not have any peripheral neuropathy and that his worsening bipolar disorder was not related to his employment exposure to toxic chemicals. The hearing representative found that the opinions of Drs. Borstein and Wade constituted the weight of the medical evidence.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his claim, including the fact that he 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 an 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.³

In the instant case, appellant has established that he is an employee of the United States and that his claim was timely filed. However, he has not established that he sustained an injury in the performance of duty as alleged.

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;⁴ (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;⁵ 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

² 5 U.S.C. § 8101 *et seq.*

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ *See Ronald K. White*, 37 ECAB 176, 178 (1985).

⁵ *See Walter D. Morehead*, 31 ECAB 188, 194 (1979).

condition is causally related to the employment factors identified by the claimant.⁶ The medical evidence required to establish causal relationship, generally, is 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,⁷ must be one of reasonable medical certainty,⁸ 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.⁹

Section 5 U.S.C. § 8123(a) states in pertinent part: "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."

Further, the Board notes that, 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.¹⁰

However, the opinion of a physician who has specialized training in a particular field of medicine has greater probative value on issues involving that particular field than opinions of other physicians.¹¹

ANALYSIS

In this case, appellant believes that his exposure to chemicals in the course of his employment caused all of his mental deficits and aggravated his preexisting emotional problems. Treating physicians who supported some employment-related toxin connection with appellant's conditions included Drs. Kuhr, Arnold, Morrow, Beggin and Scott. A psychologist, Dr. Howard, disagreed. The Office then determined that there arose a conflict in the medical evidence as to whether appellant had a cognitive dysfunction related to toxin exposure at work, and on whether appellant's depression was aggravated by the "implicated factors."

The Office referred appellant to Dr. Borstein, a psychologist, to resolve these conflicts. Dr. Borstein opined that appellant's cognitive disorders were not directly related to the reported toxic exposure but that his motor deficits appeared to be in part related to the toxic exposure. He

⁶ See generally *Lloyd C. Wiggs*, 32 ECAB 1023, 1029 (1981).

⁷ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁸ See *Morris Scanlon*, 11 ECAB 384, 385 (1960).

⁹ See *William E. Enright*, 31 ECAB 426, 430 (1980).

¹⁰ *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

¹¹ See *Effie Davenport (James O. Davenport)*, 8 ECAB 136 (1955).

noted that appellant's bipolar affective disorder and anxiety disorder were not caused by the apparent exposure to toxic chemicals and predated his employment in positions involving exposure to these chemicals, such that one could not conclude that these disorders were aggravated by possible exposures. Dr. Borstein noted that appellant did not have cognitive symptoms until the laboratory moved to Columbus and that, following that move, his exposure to these chemicals was less, with significant periods of employment being without exposure. Dr. Borstein noted that appellant's increase in symptoms occurred at a time when his exposure to neurotoxic chemicals was reduced and, therefore, he concluded that exposure to such chemicals did not cause or aggravate his bipolar disorder, but noted that the progression of his bipolar disorder was the explanation for his cognitive and emotional symptoms.

The Office found that Dr. Borstein's opinion constituted the weight of the medical opinion as to the psychological issues in question, namely whether appellant's bipolar affective disorder and anxiety disorder or depression, or their aggravation, were related to his toxic exposures.

However, as Dr. Borstein is a psychologist and not a medical doctor, his opinion on issues related to neurotoxicity and peripheral neuropathy are of diminished probative value and cannot constitute the weight of the medical evidence opinion.

The Office, therefore, properly referred appellant to Dr. Wade, a Board-certified neurologist, to resolve the medical issues of this case.

Dr. Wade opined that appellant's neurologic examination did not reveal a neuropathy or encephalopathy. He noted that quantitative sensory testing provided nowhere near sufficient data to evoke a diagnosis of peripheral neuropathy and that clinically he had no testing or study results to detect motor or sensory nerve dysfunction. Dr. Wade noted that neither Dr. Morrow nor Dr. Borstein described peripheral nerve disorders but rather diagnosed a major depressive episode, a hypomanic episode, a bipolar disorder and a panic disorder with agoraphobia, and noted that appellant's laboratory results were normal. He indicated that Dr. Beggin's report raised the possibility of encephalopathy but that was not confirmed, he summarized that appellant's neurological examination did not show any evidence of either an encephalopathy, regardless of cause, or a neuropathy due to any intrinsic or extrinsic agent.

The Office determined that Dr. Borstein's impartial medical opinion on the psychological issues in this case resolved the existing conflict and constituted the weight of the medical opinion evidence and established that appellant had sustained no aggravation of his preexisting emotional conditions, causally related to his work exposures, and developed no new psychological conditions causally related thereto.

The Office determined that the well-rationalized impartial medical opinion of Dr. Wade resolved the conflict in medical opinion on the medical issues of this case and constituted the weight of the medical evidence opinion in establishing that appellant sustained no new neurotoxicity symptoms, peripheral neuropathy, or other organic mental condition, causally related to his toxic exposures at work.

The January 28, 2003 report from Dr. Spare was not rationalized nor based on a complete and accurate factual and medical history, and was facially speculative about what “might explain” what happened to be hypomania in this case. Therefore, his report was speculative, was of diminished probative value and was not sufficient to overcome the well-rationalized reports of Drs. Wade and Borstein.

CONCLUSION

Based upon the above-noted evidence, the Board finds that appellant has not met his burden of proof to establish that he sustained a toxic neuropathy, peripheral neuropathy or any other sort of encephalopathy or brain impairment, or aggravation of his preexisting bipolar disorder, causally related to chemical exposure in his employing environment.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers’ Compensation Programs dated March 13, 2003 and August 7, 2002 are affirmed.

Issued: June 3, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member