

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SHAWN I. BUNNEY (claiming as administrator of estate of Dr. Robert E. Bunney) and DEPARTMENT OF COMMERCE, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, NATIONAL OCEAN SERVICE, Anchorage, Alas.

*Docket No. 96-448; Submitted on the Record;  
Issued February 18, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs' refusal, in its August 15, 1995 decision, to reopen appellant's claim for further review under 5 U.S.C. § 8128 constituted an abuse of discretion.

On August 10, 1991 the employee, a 57-year-old prior manager, filed a claim for an emotional condition due to work-related stress during his 3 1/2 year term of employment from which he resigned effective December 11, 1987. He noted that from counseling with Sue Fazekas, Ph.D., beginning in 1988, he became aware of the relationship between his emotional condition and his prior federal employment. The employee cited to factors of incessant overtime work in 1986 and 1987, tensions with a supervisor in the national office, stress in meeting deadlines, and general tensions with employees he supervised. The employee's supervisor in the national office did not forward the claim form to the Office at the time of completion in 1991. Appellant, the employee's son and designated representative, began to pursue the claim beginning the following year, and forwarded to the Office a newly signed claim form from the employee.

The employee died on December 18, 1993. Three weeks later, the employing establishment submitted the claim form to the Office, together with the letter of resignation from the employee dated November 23, 1987, and documents pertaining to the investigations conducted beginning 1983, including an investigation into the misappropriation of travel vouchers which lead to criminal charges of embezzlement in September 1988.<sup>1</sup>

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<sup>1</sup> The Office of Inspector General found that appellant had submitted fraudulent travel vouchers, improperly used frequent flyer miles earned during government travel and manipulated time and attendance records.

Appellant claimed entitlement to wage-loss compensation of his father for the six-year period the employee was unable to work on account of the alleged employment-related condition. He provided a 16-page statement which the employee had prepared prior to his death, in which the employee denied the allegations made as part of the investigations and the eventual charges of embezzlement. The employee restated his opinion that his emotional condition was due to incessant overtime, supervisory pressures, lack of support from colleagues and problems with his staff including mistrust. The employee identified particular stress associated with the investigation, including having been followed on a trip on August 5, 1987 and the interviews conducted as part of the investigation into his use of travel vouchers. Appellant also submitted an August 6, 1992 report from Dr. Fazekas, by which she related the employee's emotional condition to factors of his employment set forth in his 16-page statement.

By two separate requests, the Office asked Dr. Fazekas her medical specialty and requested a copy of her clinical notes. No response was forthcoming.

By decision dated June 10, 1994, the Office denied appellant's claim for an emotional condition on the basis of the insufficiency of the medical evidence. The Office cited to the statutory language which defined a physician under the Federal Employees' Compensation Act as including clinical psychologists, but indicated that due to the lack of response from Dr. Fazekas to the Office inquiries, it could not be established whether she was a clinical psychologist.

By letter dated June 4, 1995, appellant requested reconsideration. He submitted an attending physician's report from Dr. Richard Ries, a Board-certified psychiatrist, who noted that he treated the employee in the early 1990's or late 1980's but that his records of treatment had been purged. Dr. Ries diagnosed major depression, alcohol dependence and post-traumatic stress syndrome, with the "context" of treatment "clearly around old job trauma, as in his personal statement." Appellant also submitted a narrative report dated May 28, 1995 from Dr. Hyman Silver, a clinical psychologist, who reviewed the records which included the investigation records and medical records from a psychiatric evaluation by Dr. Claude O. McCoy in December 1990, and records from treatment at a local hospital in 1992 and 1993.

By decision dated August 15, 1995, the Office denied further review of the merits of appellant's claim on the grounds that he had not demonstrated an erroneous application or interpretation of law, advanced a point of law or fact not previously considered, or submitted new and relevant evidence not previously considered by the Office. The Office found the two medical reports insufficient to warrant further review, based on the diminished probative value of the reports.

The only decision of the Office before the Board on this appeal is the decision dated August 15, 1995, by which the Office refused to reopen appellant's claim for further review. Since more than one year elapsed from the prior June 10, 1994 decision and November 21, 1995, the date of appellant's appeal, the Board lacks jurisdiction to review the June 10, 1994 decision.<sup>2</sup>

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<sup>2</sup> See 20 C.F.R. § 501.3(d).

The Board finds that the Office's refusal to reopen appellant's claim for further consideration of the merits, constituted an abuse of discretion.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides 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>3</sup> 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.<sup>4</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>5</sup>

Appellant's claim was initially denied by decision dated June 10, 1994, on the grounds that a report from a counselor had been submitted, without any designation of whether the counselor was a clinical psychologist to constitute a physician under the Act.<sup>6</sup> On request for reconsideration, appellant submitted two reports, including a report from a Board-certified psychiatrist who had previously treated the employee, and a narrative report from a nontreating clinical psychologist who had reviewed the record and provided an opinion on causal relationship. Both of these reports were new reports not previously submitted to the Office, and were submitted to correct the deficiency of the lack of medical evidence submitted earlier. The Office characterized the reports as insufficient in probative value. Analyzing whether the new evidence submitted is sufficient to establish a claim is not the proper standard for determining whether a case should be reopened for merit review, but instead is the standard to be used when conducting a merit review.<sup>7</sup> Accordingly, it was improper for the Office to refuse to review the instant case on the merits. The case is remanded for a review on the merits.<sup>8</sup>

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<sup>3</sup> 20 C.F.R. § 10.138(b)(1).

<sup>4</sup> *Id.* § 10.138(b)(2).

<sup>5</sup> *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

<sup>6</sup> The Act defines a "physician" as including "surgeons, dentists, clinical psychologists, optometrists, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2).

<sup>7</sup> See *Joseph L. Cabral*, 44 ECAB 152 (1992); *Helen E. Tshantz*, 39 ECAB 1382 (1988); *Ethel D. Curry*, 35 ECAB 737 (1984).

<sup>8</sup> In the instant case, the Office based its denial of appellant's claim on the lack of medical evidence prior to determining whether the employee had established compensable factors of employment. See *Gregory J. Meisenberg*, 44 ECAB 527 (1993) (holding that prior to reviewing the medical evidence, the Office should determine whether an employee has asserted compensable factor(s) of employment and whether the evidence of record establishes the truth of the matter(s) asserted). Accordingly, a merit review would entail analyzing the factual evidence to determine whether appellant has established a compensable basis for compensation, prior to reviewing the new medical evidence submitted.

The decision of the Office of Workers' Compensation Programs dated August 15, 1995 is hereby set aside and the case remanded for further action in conformance with this decision.

Dated, Washington, D.C.  
February 18, 1998

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member