

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY D. BOYNTON and DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION EARLE, Colt Neck, N.J.

*Docket No. 97-514; Submitted on the Record;
Issued November 4, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant's gastric cancer was causally related to his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits under 5 U.S.C. § 8128(a).

On June 7, 1995 appellant, then a 41-year-old material handler-worker leader, filed a claim alleging that his gastric carcinoma was the result of his occupational exposure to "various chemicals and explosives, including, but not limited to depleted uranium, Agent Orange and/or burning rounds with uranium. Appellant stopped work on June 14, 1995.

An April 11, 1995 upper gastrointestinal series film showed "extensive tumor masses throughout the stomach" and that "the findings may represent lymphosarcoma of the stomach."

In a computerized tomography (CT) scan dated April 17, 1995, Dr. George A. Williams, a Board-certified radiologist, indicated lymphoma and carcinoma as two likely etiologies.

In a report dated April 18, 1995, Dr. B. Amadeo, based upon a surgical pathology, diagnosed malignant infiltrating carcinoma.

In a letter dated July 11, 1995, the employing establishment reported that Agent Orange was not handled at its facility and that appellant was not exposed to it while working for the employing establishment. As to depleted uranium, the employing establishment stated that appellant was exposed, but that the depleted uranium was "containerized and sealed in magazines." As to the burning uranium, the employing establishment acknowledged that "[i]t is possible he may have been exposed to some burning uranium (20,000 pounds) 10 years ago" and that it was burned only that one time.

In the job description submitted by the employing establishment, it was noted that as part of his job duties appellant "[l]eads the segregation and inspection of all types of Fleet Returned

Ammunition, Explosives and Dangerous Articles (AEDA) including guided missiles.” Under working conditions, it is noted that appellant would be “[c]onstantly exposed to large concentrations of explosive items and hazards as associated with MHE.” The job description also notes that appellant would be “exposed to danger of explosion and fire while working with explosives, chemicals and loaded ammunition.” Appellant was also responsible for checking “to determine various types or ordnance material and maintains this material in storage by checking for deterioration or hazardous conditions.”

By letter dated July 11, 1995, the Office requested appellant to submit additional evidence in support of his claim. The Office requested appellant to describe what he believes he was exposed to, where he was exposed and how often. The Office also requested appellant to provide a medical report from his treating physician with his opinion on the cause of his condition and how his federal employment contributed to his condition.

By decision dated November 21, 1995, the Office rejected appellant’s claim on the grounds that the evidence failed to support fact of injury. The Office found that appellant failed to identify any specific event, incidents or exposures to hazardous substances as well as failed to provide medical evidence which explains how his employment factors or exposures caused his cancer.

By letter dated February 26, 1996, appellant requested reconsideration of the denial of his claim. In support of his request for reconsideration, appellant submitted a letter from his wife giving a brief history of his current situation and a disability report.

By nonmerit decision dated June 15, 1996, the Office denied appellant’s request for reconsideration of the November 21, 1995 decision.

The Board finds that appellant has failed to establish that he sustained an injury in the performance of duty.

An employee seeking benefits under the Federal Employees’ Compensation Act¹ has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation of the Act, that an injury² was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.³ These are the essential

¹ 5 U.S.C. §§ 8101-8193.

² Section 8101(5) of the Act defines “injury” in relevant part as follows: “‘injury’ includes, in addition to injury by accident, disease proximately caused by employment.” Section 10.5(a)(14) of Title 20 of the Code of Federal Regulations further defines “injury” in relevant part as follows: “‘Injury’ means a wound or condition of the body induced by accident or trauma, and includes a disease or illness proximately caused by the employment for which benefits are provided under the Act.”

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

elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.⁴

In an occupational disease claim such as this, an employee must submit: (1) medical evidence establishing the existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the disease; and (3) medical evidence establishing that the employment factors were the proximate cause of the disease or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁵

Section 10.5(a)(16)⁶ defines an occupational disease or illness as “a condition produced in the work environment over a period longer than a single workday or work shift by such factors as systemic infection; continued or repeated stress or strain; or exposure to hazardous elements.” In claims not based on a specific incident, an employee must submit sufficient evidence to identify fully the particular work factors alleged to have caused the disease or condition and to show that he or she was exposed to the factors claimed; thus, the employee bears the burden of proving that work was performed under the specific factors at the time, place, in the manner, and to the extent alleged.⁷ While the employee’s condition need not be caused by a specific injury or incident, or an unusual amount of stress or exertion,⁸ the employee must submit medical evidence which diagnose a specific disease or condition and explain how identified employment factors are a competent cause of the injury.⁹

The medical evidence required is generally rationalized medical opinion evidence which includes a physician’s opinion of reasonable medical certainty based on a complete factual and medical background of the employee and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.¹⁰

The employing establishment has submitted evidence which supports appellant’s allegations that he was exposed to various chemicals during his federal employment. The Board therefore finds that appellant was exposed to chemicals and uranium. The question before the Board is whether the exposure to chemicals and uranium resulted in his gastric cancer.

An employee need not prove that employment factors significantly contributed to the claimed medical condition. If the medical evidence reveals that the employee’s occupational

⁴ *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

⁵ *Jerry D. Osterman*, 46 ECAB 500 (1995); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁶ 20 C.F.R. § 10.5(a)(16).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3 (April 1993).

⁸ *George A. Johnson*, 43 ECAB 712, 716 (1992).

⁹ *Judith A. Peot*, 46 ECAB 1036 (1995).

¹⁰ *Victor J. Woodhams*, *supra* note 5.

exposure contributed in any way to his claimed condition, that evidence is employment related and compensable.¹¹ Nor does the medical opinion evidence have to be so conclusive as to suggest causal connection beyond all reasonable doubt. The evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound and logical.¹²

In the instant case, none of the medical evidence submitted by appellant addresses the cause of appellant's gastric cancer. All the reports submitted relate to diagnosis and treatment of appellant's gastric cancer. As there is no medical opinion evidence linking appellant's gastric cancer to his exposure to chemicals or uranium or any other hazardous materials in the performance of his duties, he has failed to establish he sustained an injury.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹³ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.¹⁴ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹⁵

In his February 26, 1996 reconsideration request, appellant did not show that the Office erroneously applied or interpreted a point of law nor did he advance a point of law not previously considered by the Office. His wife merely restated her belief that appellant's cancer was caused by his federal employment. He did not submit further medical evidence. The evidence submitted by appellant therefore did not constitute relevant and pertinent evidence not previously considered by the Office. Consequently, the evidence submitted by appellant did not meet the requirements set forth at 20 C.F.R. § 10.138. The Board finds that the Office properly denied appellant's application for reconsideration of his claim.

¹¹ *Beth P. Chaput*, 37 ECAB 158 (1985).

¹² *Kenneth J. Deerman*, 34 ECAB 641, 645 (1983) and the cases cited therein at note 1.

¹³ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. §§ 10.138(b)(1)(2).

¹⁵ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

The decision of the Office of Workers' Compensation Programs dated June 15, 1996 is affirmed as modified and the November 21, 1995 decision of the Office is affirmed.

Dated, Washington, D.C.
November 4, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member