

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DONALD HARMON and DEPARTMENT OF THE NAVY,  
CHARLESTON NAVAL SHIPYARD, Charleston, S.C.

*Docket No. 97-1798; Submitted on the Record;  
Issued May 3, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying merit review of this case pursuant to 5 U.S.C. § 8128.

The Board has duly reviewed the case record and finds that the Office did not abuse its discretion in this case.

In the present case, the Office accepted that appellant, a physical science technician, sustained FB inhalation and ingestion, and cobalt industrial poisoning as a result of a dry spill which occurred on October 17, 1992. The record does not indicate that appellant stopped work after this incident. On March 31, 1994 appellant filed a Form CA-2 alleging that he had sustained a post-traumatic stress disorder after his radiation exposure on October 17, 1992. Appellant stated that he experienced insomnia, edginess and family disorder. Appellant also stated that his condition had now peaked and that he first realized the condition was caused or aggravated by his employment on January 27, 1994. Appellant provided a supplemental statement to the Office on June 4, 1994.

On April 3, 1995 the Office requested that appellant provide information so that the Office could prepare a statement of accepted facts for use by physicians in making an opinion regarding the cause of the diagnosed condition. The Office noted that appellant had indicated in his prior statements that he believed he was exposed to additional isotopes beside Cobalt 60. The Office asked appellant to address what else he believed he was exposed to and why he believed he had such other exposures. The Office also asked appellant to explain his previous statements that his emotional condition peaked on January 27, 1994 and that he had sustained a "family disorder. Appellant was asked to explain any events that occurred between the incident of October 17, 1992 and January 27, 1994, which contributed to his alleged emotional condition. Appellant was also asked to address, within his specialized radiation training, what he understood the magnitude of his radiation exposure to be. Finally, the Office requested that appellant explain the timing of when he became concerned that his exposure might harm him.

Appellant did not respond to this request for further information. On June 5, 1995 the Office again wrote to appellant advising that no response had been received to the April 3, 1995 letter, and that it was his responsibility to provide the factual information and medical opinion evidence necessary to establish his claim. Appellant was advised that he had not yet discharged his burden of proof and would be given an additional 30 days to respond to the April 3, 1995 letter. Appellant did not respond to this request.

The Office denied appellant's claim by decision dated July 12, 1995. In the memorandum to the Director accompanying the decision, the claims examiner stated as follows:

“[Appellant] was asked to provide additional facts needed for the preparation of a statement of accepted facts to be sent, with detailed questions to Dr. Synder, his attending psychologist.”

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“The facts [appellant] has failed to provide are necessary components of a complete and accurate factual background for medical opinions on his emotional disorder and any connection it may have to the accepted employment incident. By his failure, he has prevented the Office from preparing a proper finding of facts for use as the frame of reference for any definitive medical opinions on the issue. In the absence of these facts, no medical opinion in the record is based upon a complete and accurate factual and medical background of the claimant and the Office cannot proceed further to secure any such medical opinion.”<sup>1</sup>

By decision dated November 28, 1995, an Office hearing representative affirmed the denial of appellant's emotional condition claim. The hearing representative found that appellant had been asked on two occasions to provide factual information that only he could provide so that additional development of the medical record could be undertaken. However, appellant declined to respond to either request. The hearing representative concluded that without a proper and accurate statement of accepted facts, further development of the medical evidence was impossible.

Appellant requested reconsideration on November 13, 1996. In support of his request for reconsideration appellant's representative submitted additional medical reports, correspondence,

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<sup>1</sup> Under regulations promulgated pursuant to the Federal Employees' Compensation Act, at 20 C.F.R. § 10.100(b) a claim for occupational disease or illness must be accompanied by a statement from the employee to include:

- (1) A detailed history of the disease or illness with identification of part(s) of the body affected;
- (2) Complete details of types of substance or conditions of employment believed responsible for the disease or illness;
- (3) A description of specific exposures to substance or stressful conditions including locations, frequency and duration, and
- (4) Whether the employee ever suffered a similar condition and, if so, full details of onset, history and medical care received with names and addresses of physicians rendering treatment.

office notes and billing statements from Dr. William H. Synder, appellant's treating clinical psychologist. Appellant's representative stated that this issue in this case was whether appellant's emotional problems were causally related to the October 17, 1992 work-related incident and that the additional evidence supported a finding of causal relationship. The Office denied appellant's application for review on the grounds that the evidence submitted in support of the request for review was immaterial and not sufficient to warrant review of the prior decision.

The Board finds that the Office did not abuse its discretion in this case.

The Office's regulations at 20 C.F.R. § 10.138(b)(1) provide that a claimant may obtain a 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. 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>2</sup>

Appellant did not show that the Office erroneously applied or interpreted a point of law, nor has he advanced a point of law or a fact not previously considered by the Office. Accordingly, he was not entitled to a merit review of his claim based on the first or second requirement set forth above. Appellant, in support of his request for reconsideration submitted additional medical reports, office notes and billing statements from his treating psychologist, Dr. Snyder. The Office had previously received and reviewed several reports from Dr. Snyder wherein he diagnosed appellant as having post-traumatic stress disorder, which he opined was causally related to the employment injury. While the record indicates that the evidence in support of the request for reconsideration was new, it was neither relevant nor pertinent evidence, as it did not address the particular issue which was the basis of the denial of the claim. The Office denied appellant's claim because appellant had not submitted the necessary factual evidence for a preparation of a statement of accepted facts. As explained by the Office in the denial of the claim, without a complete factual background the Office could not prepare a statement of accepted facts, and the Office could not ascertain whether any medical opinion expressed regarding causal relationship was based upon a proper factual background. To reopen the case the Office required that appellant provide the requested factual information detailing his claim. The evidence appellant submitted in support of his request for reconsideration was medical evidence, not the factual background evidence requested. Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>3</sup> Therefore, the Office's refusal to reopen appellant's case for further consideration on the merits of its claim, by its January 30, 1997 decision, did not constitute an abuse of discretion.

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<sup>2</sup> 20 C.F.R. § 10.138(b)(2); *Norman W. Hanson*, 45 ECAB 430 (1994).

<sup>3</sup> *Ernest J. LeBreux*, 42 ECAB 736 (1991).

The decision of the Office of Workers' Compensation Programs dated January 30, 1997 is hereby affirmed.

Dated, Washington, D.C.  
May 3, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member