

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL M. TOLER and DEPARTMENT OF VETERANS AFFAIRS,  
SAN DIEGO VETERANS ADMINISTRATION HEALTH CARE SYSTEM,  
San Diego, CA

*Docket No. 00-308; Submitted on the Record;  
Issued December 21, 2000*

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DECISION and ORDER

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

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained a disabling medical condition causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying merit review of appellant's claim.

On November 27, 1998 appellant, then a 57-year-old certified respiratory therapist supervisor, filed a notice of occupational disease and claim for compensation, Form CA-2, alleging that his hiatal hernia was aggravated by employment factors. He stated that he first realized his condition was caused or aggravated by his employment on August 11, 1988. Appellant submitted witness statements, which confirmed his statement that members of the department were aware of his condition but it never affected the quality or quantity of his work. Appellant asserted that lifting requirement in his job aggravates his condition and that his weight lifting restrictions were imposed due to his condition. Statements from the employing establishment acknowledged that they were accommodating appellant's restrictions.

An August 11, 1988 esophagram revealed a small nonrefluxing hiatal hernia, but otherwise a normal esophagus. A May 25, 1994 operative report to remedy an acute episode of esophageal food impaction, also diagnosed a small hiatal hernia.

In a September 22, 1998 medical report, Dr. Jeffrey A. Mullvain, a Board-certified internist/cardiologist, and appellant's treating physician, stated that appellant suffers from frequent PVC's and a hiatal hernia and restricted appellant to lifting, pushing or pulling no more than five pounds. In an October 9, 1998 report, Dr. Mullvain reported that appellant had suffered two episodes of provocation of his gastroesophageal reflux in the last calendar year where, after lifting too heavy of an object, he developed severe epigastric and lower chest pain, which was thought to be esophageal spasm secondary to his gastroesophageal reflux. Dr. Mullivan stated that appellant could maintain a 20-pound weight restriction at work without

any concern of exacerbating his medical condition either in his function as a respiratory therapist or supervisory duties.<sup>1</sup>

In an April 12, 1999 report, Dr. Taddese T. Desta, a Board-certified internist specializing in gastroenterology and an Office referral physician, evaluated appellant to determine the impact of the hiatal hernia and reflux disease in his day-to-day activity and job performance. He noted that appellant had an esophagram done on August 11, 1998, which showed a small nonrefluxing hiatal hernia. Dr. Desta opined that this condition was not directly related to nor caused by his employment. He stated that repetitive bending and the lifting of heavy objects would aggravate appellant's reflux disease, without question. Dr. Desta noted that a May 25, 1994 examination, whereby appellant had an episode of food caught in his esophagus, which had to be extracted via an endoscopic procedure, revealed a G-junction area, mild erythema and edema and mild esophagitis, which could have been from trauma or from appellant's reflux disease. He noted that a reendoscopy was recommended, but never done. Accordingly, Dr. Desta stated that since he did not have any recent or follow-up endoscopy, there was no endorgan damage/esophageal injury from his reflux disease to show justification of disability. He additionally opined that appellant's subjective complaints that were related to his hiatal hernia or reflux disease were also minimal to none existent and could have been from the medication he is taking. Dr. Desta recommended continuation on Prilosec and opined that appellant may benefit from 24-hour pH monitoring and motility study to see the degree of his reflex disease and also to justify his disability and lifestyle modification. Appellant, however, declined the suggested diagnostic procedure of esophagogastroduodenoscopy.

In a letter dated May 18, 1999, the Office asked Dr. Desta to explain whether he believed that appellant's work activity of bending and lifting of heavy objects would aggravate his actual medical condition or his symptomatology. In a clarification report of June 14, 1999, Dr. Desta stated that activities, such as repetitive bending and lifting heavy objects, could aggravate appellant's reflux disease if appellant has significant gastroesophageal reflux disease (GERD). He explained that those activities would cause reflux of acid from the stomach or gastric juice into the esophagus. Dr. Desta stated that he had previously recommended a 24-hour pH monitoring and reendoscopy to confirm the diagnosis and possible end-organ damage. He stated that since there are no studies to confirm the diagnosis and presence of end-organ damage, an aggravation of the reflux disease could not be concluded.

By decision dated July 30, 1999, the Office denied appellant's claim on the basis that the weight of the medical evidence of record failed to establish that appellant's hiatal hernia condition was causally related to or aggravated by factors of his federal employment. The Office specifically found that appellant performed heavy lifting, pushing and pulling as part of his regularly assigned work duties.

Appellant requested reconsideration and submitted a May 26, 1999 comparison esophagram to the original esophagram of August 11, 1988. The findings reported were that of a normal esophageal peristalsis with no evidence of acute disease. A redemonstration of a small hiatal hernia was incidentally noted.

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<sup>1</sup> A November 6, 1998 report from Dr. Mullvain stated that appellant's arrhythmias were not affecting his job.

By decision dated September 28, 1999, the Office denied appellant's request for reconsideration on the basis that the evidence was of an irrelevant nature and thus not sufficient to warrant a merit review.

The Board finds that appellant has not met his burden of proof in establishing that his hiatal hernia condition is causally related to compensable factors of employment.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> 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 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.<sup>3</sup> These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>4</sup>

Causal relationship is a medical issue<sup>5</sup> and the medical evidence required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized medical opinion on 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, must be one of reasonable medical certainty<sup>6</sup> 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.<sup>7</sup>

In the instant case, the Office found that heavy lifting, pushing and pulling were part of appellant's regular assigned work duties. However, appellant has submitted no rationalized medical evidence establishing that his hiatal hernia condition is causally related to compensable employment factors. Although Dr. Mullvain noted in his report of October 9, 1998 that appellant experienced episodes within the past year where, after lifting too heavy an object, severe epigastric and lower chest pain developed, which were "thought to be esophageal spasm secondary to gastroesophageal reflux," Dr. Mullvain's opinion is speculative in nature and is not supported by any objective findings to confirm the esophageal spasm or gastroesophageal reflux. The mere fact that a condition manifests itself during a period of employment does not raise an

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>5</sup> *Mary A. Howard*, 45 ECAB 646 (1994); *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>6</sup> *See Morris Scanlon*, 11 ECAB 394, 385 (1960).

<sup>7</sup> *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, *supra* note 4.

inference that there is a causal relationship between the two.<sup>8</sup> Neither the fact that the condition became apparent during a period of employment nor the belief of appellant that the condition was caused by or aggravated by employment conditions is sufficient to establish causal relation.<sup>9</sup> Dr. Desta specifically stated that in the absence of appropriate testing, an aggravation of the reflux disease could not be established.

Consequently, as appellant has not submitted a medical report based on objective testing and medical rationale demonstrating how appellant's reflux disease was aggravated by factors of his employment, he has failed to meet his burden of proof.<sup>10</sup> The Office, therefore, properly denied appellant's claim for compensation.

The Board also finds that the Office properly denied reconsideration.

Under section 8128(a) of the Act,<sup>11</sup> the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,<sup>12</sup> which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by the OWCP.”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>13</sup> If a claimant fails to submit relevant evidence not previously of record or advance legal contentions or facts not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits pursuant to section 8128.<sup>14</sup>

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<sup>8</sup> *Jerry D. Osterman*, 46 ECAB 500, 508 (1995); *Manuel Garcia*, 37 ECAB 767, 773 (1986); *Juanita C. Rogers*, 34 ECAB 544, 546 (1983).

<sup>9</sup> *Id.*

<sup>10</sup> *Betty J. Parker*, 46 ECAB 920 (1995).

<sup>11</sup> 5 U.S.C. § 8128(a).

<sup>12</sup> 20 C.F.R. § 10.606(b) (1999).

<sup>13</sup> 20 C.F.R. § 10.608(b) (1999).

<sup>14</sup> *John E. Watson*, 44 ECAB 612, 614 (1993).

In the present case, appellant's claim was denied on the basis that he had not established that his hiatal hernia condition was causally related to factors of his employment. The comparison esophagram of May 26, 1999 showing an incidental finding of a small hiatal hernia condition. This comparison esophagram, however, fails to address the issue of whether appellant's hiatal hernia condition is caused or aggravated by his work duties of heavy lifting, pushing and pulling. The additional evidence was, therefore, properly found to be irrelevant and not sufficient to require reopening of appellant's case for reconsideration of his claim pursuant to section 8128.

As the medical evidence submitted is not relevant and pertinent to the issue in this case it, therefore, is insufficient to warrant reconsideration.<sup>15</sup> The Board finds that the Office properly denied appellant's application for reconsideration of his claim.

The decisions of the Office of Workers' Compensation Programs dated September 28 and July 30, 1999 are hereby affirmed.

Dated, Washington, DC  
December 21, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

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<sup>15</sup> 20 C.F.R. § 8128(a)(3).