U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM E. MOORE and DEPARTMENT OF THE ARMY, ROCKY MOUNTAIN ARSENAL, Commerce City, CO

Docket No. 98-1187; Submitted on the Record;
Issued January 14, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant established that he sustained an injury in the performance of duty causally related to his federal employment; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for a merit review on February 2, 1998.

On November 4, 1996 appellant, then a 53-year-old chemical plant helper and operator, filed a notice of occupational disease alleging that he suffered tiredness, stress, motion rapid movement, lack of saliva production, dizziness, rapid heart beat, fear, weak legs, difficulty breathing and fatigue as a result of his exposure to tabun nerve gas, a cholinesterase inhibitor, in December 1974 in the course of his federal employment. He indicated that he became aware of the disease or illness in January 1975 and realized it was caused or aggravated by his employment in October 1996.

In support of his claim, appellant submitted records from the Piedmont Center for Mental Health Services indicating that he received treatment from June 12, 1987 through August 30, 1996. A summary letter from Dr. David C. Jacobs, a Board-certified psychiatrist and neurologist, dated August 21, 1996, indicated that appellant was diagnosed with post-traumatic stress syndrome and panic disorder with agoraphobia. Dr. Jacobs also indicated on August 30, 1996 that appellant was totally disabled due to the diagnosed conditions. Appellant also submitted medical records from 1981 through 1997 documenting his continued treatment for mental illness along with treatment for tobacco abuse, possible lung tissue scarring, tachycardia, coronary artery disease, chest pain, high blood pressure, pneumonia and a rash.

Appellant submitted a May 1, 1974 cholinesterase test performed by Dr. Forrest D. Taylor which established that prior to appellant's job as a chemical plant helper and operator he had a cholinesterase level of .78. Subsequently cholinesterase tests conducted on December 16 and 17, 1974 and January 16, 1975 rendered results of .82, .66 and .70, respectively.

In a statement dated November 4, 1996, appellant stated that he began working as a chemical plant helper in September 1974. He indicated that he worked with GB nerve gas, sarium, tabun and possibly other chemicals like CG phosgene. Appellant stated that he wore a protective rubberized suit including boots, gloves and a filtered face mask. He stated that the suits were tested with a banana odor capsule. Appellant indicated that his duties involved transporting and x-raying bombs. He further indicated that he cut, drilled and removed bomb parts. Appellant stated that, in late December 1974, a red warning light went off indicating that there were "leakers" in the inerting room in which he was working. He stated that upon arriving to a safe room he broke a banana odor capsule and detected the odor. Appellant stated that he then injected himself with atropine. He reported this to his supervisor and was told that his eyes were not dilated. Appellant stated that he was later told that the plant contained 1940 bombs containing tabun nerve gas. He stated that in January 1975 he began to feel tired and requested a transfer. Appellant stated that initially he thought his problem stemmed from post-traumatic stress disorder and agoraphobia arising from his Vietnam experience.

On January 29, 1997 the Office advised appellant of the evidence needed to establish his claim.

On February 10, 1997 appellant again indicated that he had been exposed to a chemical warfare biological nerve agent and that he had never received treatment for the exposure.

In a letter received by the Office on March 17, 1997 appellant again indicated that he previously worked with sarin nerve gas (GB), tabun nerve gas, soman nerve gas and phosgene. He indicated that the bombs he worked with occasionally leaked due to old age. Appellant stated that in December 1974 he was exposed to GB. He stated that, after he removed his passed-out partner from the inerting room, he detected a banana odor in his suit after breaking an odor capsule. Appellant stated that he injected himself with atropine. He stated that he reported the event to his supervisor and was told that his eyes were not dilated. Appellant stated that Dr. Taylor examined him the next day and said he was okay. He indicated that he subsequently began to get tired.

On September 23, 1997 appellant restated that he had symptoms of nerve gas exposure. He indicated that he was exposed to GB.

The employing establishment subsequently provided a job description similar to the one appellant had in 1974. It indicated that a worker in appellant's previous position would dispose of toxic chemical agents such as "GB, VX, HD, HT and H." It further indicated that danger to self due to exposure to unusually hazardous agents or conditions was compensated by premium pay.

By decision dated April 9, 1997, the Office found that appellant was exposed to certain toxic chemicals. The Office, however, also found that the medical evidence failed to establish a connection between his medical conditions and the accepted exposure. It, therefore, found that an injury was not demonstrated and denied the claim.

On April 9, 1997 the employing establishment stated that the facility where appellant worked only handled GB nerve agent, otherwise known as sarin. It stated that appellant did not

work with tabun nerve gas or any 1940 German nerve gas. It confirmed the work process described by appellant, but denied that appellant was exposed to a highly radioactive room. The employing establishment indicated that it had no records indicating that appellant was exposed to sarin in December 1974. It did indicate that the procedure described by appellant in dealing with such a threat was accurate. It stated that if such an incident occurred its procedures required that the incident be reported and evaluated immediately by its medical staff. It stated that because appellant did not report dilated eyes, his symptoms were not consistent with GB exposure. It also noted that appellant did not present other symptoms of exposure such as inability to see, chest tightening and sweating. The employing establishment further noted that appellant was protected by a safety suit and that it maintained monitoring devices to detect hazardous agents. It further indicated that it medically monitored its workers.

On April 10, 1997 appellant indicated that he did not know what chemical agents he worked with, but he was surprised to learn that he worked with VX, HD and HT.

On April 16, 1997 appellant requested a written review of the record. Appellant indicated that he had "B" clearance to handle mustard gas, GB and phosgene. In support, appellant resubmitted his 1974 cholinesterase tests.

On June 17, 1997 Dr. Urban L. Throm, II, an employing establishment physician and a Board-certified dermatologist, stated that all of appellant's cholinesterase tests taken in 1974 rendered normal results. Dr. Throm stated that employees with abnormal results were not allowed to continue working. He stated that if an employee was exposed to a toxic agent, he was sent immediately for medical treatment. Dr. Throm stated that employees were routinely monitored for toxic exposure. He stated that appellant never presented at the health clinic for possible nerve gas exposure. Finally, Dr. Throm stated that he was unaware of any men suffering an acute exposure who claimed long-term toxic manifestations.

On June 19, 1997 the employing establishment again indicated that the only toxic agent present in the area where appellant worked was GB. It stated that appellant did not work with phosgene despite his clearance to work with the agent.

On July 3, 1997 appellant indicated that there was scant supervision at the employing establishment facility. He noted that a coworker showed him how to respond to phosgene exposure and indicated that the phosgene was contained in a sealed room about a mile from his chemical plant. Appellant indicated that in 1974 "leakers" occurred five days a week. He stated that supervisors were not present in 1974 when he had to inject himself with atropine. Appellant indicated that sometimes their equipment was not sterilized. He again stated that he x-rayed bombs with high radiation. Appellant stated that at no time was he closely supervised. He indicated that his many conditions suggest that he was exposed to chemical agents. Appellant stated that he was exposed to some chemical agent.

By decision dated August 11, 1997, the Office hearing representative found that appellant failed to establish that he was exposed to either phosgene or GB. The hearing representative also found that the record contained no medical evidence relating any of appellant's conditions to such exposure. Consequently, the hearing representative affirmed the Office's April 9, 1997

decision denying benefits, but modified the decision to reflect that appellant failed to establish that he was exposed to phosgene or GB.

On December 23, 1997 appellant requested reconsideration on the basis that he had increasing keratosis of his skin and mental disorders. He again stated that he was poorly supervised and used contaminated equipment.

By decision dated February 2, 1998, the Office ordered that appellant's request for review be denied because the evidence submitted in its support was immaterial and not sufficient to warrant review of the prior decision.

The Board finds that appellant failed to establish that he sustained an injury in the performance of duty causally related to his federal employment.

A person who claims benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his claim, including the fact that he sustained an injury while in the performance of his duty and that he had disability as a result.[2]

In accordance with the Federal (FECA) Procedure Manual, in order to determine whether an employee actually sustained an injury in the performance of her duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally, "fact of injury" consists of two components which must be considered one in conjunction with the another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[3] In order to meet his burden of proof to establish the fact that he sustained an injury in the performance of her duty, an employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[4] The second component is whether the employment incident caused a personal injury and generally can be established only be medical evidence.[5]

In this case, appellant alleged that he was exposed to GB in a December 1974 work incident. Appellant stated that while working on a chemical bomb in the inerting room, a red warning light went on. He stated that he tested his protective suit with an odor capsule and detected a leak in his suit. He stated that he then injected himself with atropine.

The evidence of record, however, does not establish that any exposure to GB occurred in December 1974. Appellant indicated that immediately after the incident his supervisor examined him and found that he did not exhibit the primary sign of GB exposure, dilated eyes. Moreover, both the employing establishment and its physician, Dr. Throm, stated that following any

[1] 5 U.S.C. §§ 8101-8193.

[2] *Daniel R. Hickman*, 34 ECAB 1220, 1223 (1983); *see* 20 C.F.R. § 10.110(a).

[3] *John J. Carlone*, 41 ECAB 354 (1989).

[4] *Louis F. Garnett*, 47 ECAB 639 (1996).

[5] *Id.*

potential toxic exposure its employees were required to seek medical attention. The record, however, fails to contain any evidence establishing that appellant sought or medical received treatment for GB exposure. Dr. Throm also indicated that appellant's cholinesterase tests taken after appellant's alleged exposure in December 1974 rendered normal results. Accordingly, appellant failed to meet his burden of proof of establishing that he was exposed to GB in December 1974.

Appellant also generally asserted that he was exposed to other toxic agents while working at the employing establishment. The employing establishment, however, submitted evidence establishing that the plant in which appellant work only processed GB. In addition, appellant submitted no evidence supporting his assertion that he was exposed to GB or any other toxic agent while working in the employing establishment, other than his description of the December 1974 incident. Accordingly, appellant failed to establish any exposure to toxic agents in the course of his employment.

The Board also finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review on February 2, 1998.

Under section 8128(a) of the Act,[6] 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 10.138(b)(1) of the implementing federal regulations,[7] which provides that a claimant may obtain review of the merits of the claim by:

"(i) Showing that the Office erroneously applied or interpreted a point of law; or

"(ii) Advancing a point of law or a fact not previously considered by the Office; or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[8]

In support of his request for reconsideration, appellant wrote a letter indicating that he had keratosis of the skin and mental disorders. He also indicated that he was poorly supervised and used contaminated equipment. Because appellant failed to describe specific instances of his exposure to toxic agents, his assertions are not relevant to his establishing fact of injury. The Office, therefore, did not abuse its discretion by refusing to reopen appellant's claim for a merit review in its February 2, 1998 decision.

[6] 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.138(b)(1).

[8] 20 C.F.R. § 10.138(b)(2).

The decisions of the Office of Workers' Compensation Programs dated February 2, 1998 and August 11, 1997 are affirmed.

Dated, Washington, D.C.
January 14, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member