

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MILTON E. LEE and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, East Orange, NJ

*Docket No. 99-1896; Submitted on the Record;
Issued November 15, 2000*

DECISION and ORDER

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

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty as alleged; (2) whether the Office of Workers' Compensation Programs properly denied appellant's claim for a back condition on the grounds that he did not establish that his claim was filed within the applicable time limitation provisions of the Federal Employees' Compensation Act; and (3) whether 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) constituted an abuse of discretion.

Appellant, a 37-year-old former veteran affairs police officer, filed an occupational disease claim on March 29, 1997 alleging that he first became aware on December 17, 1996 that his acquired immunodeficiency syndrome (AIDS), back condition, hearing and respiratory damage were caused by his employment. Appellant asserted that he contracted AIDS through scratches and cuts received from infected patients while trying to control them. He also asserted that he suffered a back injury in a motor vehicle accident while on duty on July 28, 1991, which had worsened due to employment factors. The record reflects that the motor vehicle accident occurred at 3:50 p.m., on a day when appellant's scheduled work hours were 7:00 a.m. to 3:00 p.m. Appellant did not stop work as a result of his injury; however, he worked light duty for some time and later returned to full duty. There is no evidence of record that appellant notified his employer that his after work hours motor vehicle accident was in the performance of duty. Appellant was removed from his position on October 15, 1993 for conduct unbecoming of an officer. Appellant indicated this date as the last day he was exposed to conditions alleged to have caused his condition.

Appellant submitted a report from Dr. Earl Shaw, his attending physician, dated January 10, 1996, which related his complaints of back stiffness and soreness and noted his July 28, 1991 motor vehicle accident where he sustained a hyperflexion/hyperextension injury. At the time of his examination, he noted that a December 11, 1992 magnetic resonance imaging (MRI) scan showed bulging and disc herniation and that appellant had been unable to bend,

stoop, lift or perform prolonged sitting or standing. Dr. Shaw opined that appellant was totally disabled from any gainful employment at that time. Appellant also submitted reports from his chiropractor, Dr. Thomas Sidoti, with x-rays and the results of an MRI, which revealed lumbar sprain/strain, lumbar neuritis, facet syndrome and spondylosis. Dr. Sidoti causally related appellant's condition to his July 28, 1991 motor vehicle accident and opined that appellant's injury would likely cause him future problems from aggravation and trauma. Appellant further submitted progress notes from his medical record, which indicated that he was diagnosed with AIDS in November or December 1996. Appellant also submitted a consultation report dated March 7, 1995, which indicated that he reported hearing loss to an audiologist, with no indication of the cause or extent of the condition.

By decision dated July 30, 1997, the Office denied appellant's claim as he failed to demonstrate that he sustained an employment-related injury within the meaning of the Act.

By letter dated August 6, 1997, appellant requested an oral hearing before an Office hearing representative. A hearing was held on September 2, 1998. During the hearing, appellant testified that his injuries resulted from work factors and although he had been injured before, he had no problems prior to his federal employment. Appellant testified that during his employment he was instructed to lift heavy furniture and sometimes cars, even though he had a back injury and those duties caused bulging and swelling back muscles. Appellant testified that while still employed he would advise his chiropractor that his back was hurting and that, "I can[no]t keep moving this stuff. But anyhow, if you want your job you are going to do what we tell you to do." He also testified that he was not sure how he contracted AIDS and that he had not been treated for this condition until 1997. When referring to how he contracted the disease, appellant stated: "It could have been from scratches, it could have been from a lot of different things." He further testified that his medical record contained a physician's opinion regarding his condition and total disability. At the conclusion of the hearing, the hearing representative requested a copy of appellant's medical record within 30 days and on October 13, 1998, the Office received appellant's record for review.

By decision dated November 5, 1998, the Office affirmed the July 30, 1997 decision. The Office hearing representative noted that appellant filed an occupational disease claim in March 1997 and partly alleged that he sustained back injuries in a July 28, 1991 motor vehicle accident while on duty; however, he did not file a traumatic injury claim for such injuries at that time. The hearing representative noted that, even if the occupational disease claim encompassed the back injury and the traumatic event of July 28, 1991, appellant would still fail to meet his burden with regard to the three-year time limitation. With regard to the allegations that appellant contracted AIDS while on duty, the hearing representative found that as appellant first became aware of the disease sometime in 1995, his claim was timely filed; however, there was no medical evidence of record to establish causal relationship. The hearing representative based her decision regarding this condition on progress notes of record from the Veterans Administration Hospital, which noted appellant's diagnosis of AIDS, but did not offer the source of the condition or a causal relationship to factors of his employment.

Appellant requested reconsideration in an undated letter received by the Office on December 7, 1998 and submitted a statement in support of his request. Appellant argued that his

conduct as an officer and removal was immaterial to his claim for compensation, nevertheless he argued that he did good work and an official from the employing establishment headquarters ordered that he be rehired. He argued further that, when dealing with patients while on duty, he was not allowed to wear gloves and that as a consequence, he had been cut and scratched. Appellant also stated that his sergeant did not keep a daily log of such incidents so there would be no reference to these events in his medical records. He recounted various acts and remarks committed by white officers against black officers that he viewed discriminatory, which contrary to the hearing representative's decision, he argued were relevant to his case. Appellant argued further that after his back injury, he was offered a light-duty position as dispatcher; however, he should have been able to receive benefits and heal properly in order to return to his preinjury duties. Appellant also argued that, once he returned to regular duties, he was instructed to lift heavy furniture and sometimes cars, which worsened his back condition. He concluded by arguing that if he did not contract AIDS in the performance of duty, he was likely infected by contaminated blood when hospitalized in the East Orange Veterans Hospital in 1995. Appellant indicated that he believed, however, that because medical staff informed him that he probably had the condition for at least four years, he likely contracted the disease while federally employed.

By decision dated December 15, 1998, the Office denied appellant's request for review of the merits as the evidence in support of the request was found to be of an immaterial nature and insufficient to warrant review of the prior decision. The Office found that appellant raised arguments that were either irrelevant or the evidence provided had been previously reviewed. As such, the evidence was insufficient to allow reopening of the case for merit review.

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

An employee seeking benefits under the Act 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 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.¹ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.²

In an occupational disease claim such as this, claimant 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 that the diagnosed condition is causally related to the employment factors identified by the claimant.³

¹ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

² *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

³ *Jerry D. Osterman*, 46 ECAB 500 (1995); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

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 claimant and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁴ Neither the fact that appellant's condition became apparent during a period of employment nor appellant's belief that the condition was caused by his employment is sufficient to establish a causal relationship.⁵

In this case, appellant reported on his claim form that he had contracted AIDS, suffered from back problems and sustained hearing and respiratory damage as a result of his employment. With respect to his claim for compensation for AIDS and respiratory and hearing damage, the Board finds that appellant has not submitted sufficient factual and medical evidence to establish that these conditions were caused by his federal employment. Appellant has not submitted any medical reports diagnosing a respiratory condition. He has also had not provided sufficient factual evidence detailing factors of employment alleged to have caused this condition. The record is further deficient of a rationalized medical opinion relating a respiratory condition to appellant's work duties and, therefore, he has not established that he sustained this condition in the performance of duty. The medical record refers briefly to appellant's complaint for hearing loss in a progress note dated March 7, 1995 but does not relate a condition of hearing loss to any employment factors. Although appellant has consistently stated that he had received scratches and cuts from patients, which he argued likely led to him contracting AIDS, the medical evidence does not indicate the source of his disease or provide a rationalized opinion as to whether his condition was causally related to employment factors. The fact that medical personnel indicated that appellant likely suffered from AIDS for four years prior to his knowledge of the illness and that he was federally employed at that time, is not sufficient to establish a causal relationship between the disease and factors of his employment. Appellant has, therefore, failed to establish fact of injury.

The Board further finds that the Office properly denied appellant's compensation claim for his back condition on the grounds that he did not establish that his claim was filed within the applicable time limitation provisions of the Act.

Section 8122(a)⁶ of the Act provides that an original claim for compensation for disability or death must be filed within three years after the injury or death, unless the immediate superior had actual knowledge of the injury or death within 30 days, which knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury or death, as provided by 5 U.S.C. § 8122(a)(1), or written notice of injury or death was given within 30 days.

Appellant alleged back problems on his CA-2 form filed on March 27, 1997 as a result of a motor vehicle accident on July 28, 1991, which he alleged occurred while on duty. The police report of record, however, indicates that the motor vehicle accident occurred 50 minutes after the

⁴ *Victor J. Woodhams, supra* note 3.

⁵ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

⁶ 5 U.S.C. § 8122(a).

end of appellant's work shift. Appellant has not submitted any evidence that he notified anyone within 30 days of the employment-related nature of this injury. The record indicates that appellant sued Allstate Insurance Company and collected a settlement and that he sued the city of Newark for a defect in the traffic signal. There is no evidence that appellant claimed his injury was sustained in the performance of duty at the time that it occurred.

Appellant also alleged that when he returned to regular duty after performing light duty, his duties worsened the pain and led to his disability. Appellant was eventually terminated from his employment on October 15, 1993 and indicated this date on his CA-2 form as the last date in which he was last exposed to employment factors having caused his condition. The Office found that appellant's claim for compensation on March 29, 1997 due to back problems resulting from injuries sustained in the 1991 motor vehicle accident, although filed in an occupational disease claim and not one of traumatic injury, was untimely filed.

The Board finds that the Office properly determined that appellant's claim for his back condition was untimely. Appellant filed his CA-2 form on March 29, 1997 and indicated that he first became aware of his condition on July 18, 1995 and noted December 17, 1996 as the date he first realized his condition was caused by his employment. The dates noted on the form, however, only appear to correlate to dates when appellant became aware that he tested positive for the HIV virus. Appellant indicated in a statement attached to his claim that he tested positive for HIV in 1995. The record also contains progress notes with an entry dated December 17, 1996, which noted that appellant received positive test results for HIV and was counseled on his illness that day. Further, appellant indicated on his claim form that he did not file his claim earlier because he awaited blood results of an HIV test, which he received on February 18, 1997. There is no medical opinion of record that appellant's back condition was caused by occupational factors of employment. The medical evidence of record establishes that appellant's back condition resulted from a July 28, 1991 automobile accident, to which appellant filed no claim and received medical treatment from August 3, 1991 through September 17, 1993. The dates listed on the claim form do not pertain to dates appellant was treated and evaluated for his back condition. According to the record, appellant was not treated or evaluated again for his back condition until January 19, 1996. Further, the January 10, 1996 report from Dr. Shaw did not causally relate appellant's back condition to occupational factors of employment.

Since appellant was last exposed to the employment factors alleged in his claim on October 15, 1993, the last day in which he was federally employed; October 15, 1993 is in effect the date of injury of his back condition. Although appellant now claims that he was not aware of the employment-related nature of his back condition until 1996, appellant's allegations are not supported by the record. Appellant, in fact, testified that he believed his back condition worsened because of heavy lifting at work prior to 1993, while he was still employed. The evidence of record only substantiates appellant's belief that his continued employment aggravated his back condition, a belief he has held since prior to 1993.

The evidence of record does not indicate that appellant put his immediate supervisor reasonably on notice of an employment-related injury within 30 days of becoming aware of the condition or that he provided written notice within 30 days, thus, the three-year limit for filing

occupational disease claims had expired. Appellant's compensation claim for his back condition was, therefore, untimely filed.

The Board also finds that the Office did not abuse its discretion in this case in denying merit review.

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.⁷

Appellant attempted to show that the Office erroneously applied or interpreted a point of law, however, in doing so, he asserted arguments that had either been considered by the Office or arguments that were immaterial to the issue of whether appellant had established that he sustained an injury in the performance of duty. Evidence which is repetitive or cumulative of that already in the record does not constitute new relevant and pertinent evidence and is, therefore, not a basis for reopening a case.⁸ Appellant's arguments regarding his conduct as an officer, his removal and the employing establishment's reported decision to rehire him, his arguments regarding racial discrimination and his contention that scratching incidents had not been reported, have been previously considered by the Office and are, therefore, repetitive and immaterial. Appellant's assertion that his assignment while on light duty worsened his condition is immaterial as to whether he initially sustained a work-related injury and his argument that he could have contracted AIDS while hospitalized also fails to support his claim that he contracted the disease while at work. The Board, therefore, finds that this evidence is repetitive and immaterial and does not constitute relevant evidence.

⁷ 20 C.F.R. § 10.138(b)(2); *Norman W. Hanson*, 40 ECAB 1160 (1989).

⁸ *James E. Salvatore*, 42 ECAB 309 (1991).

The decisions of the Office of Workers' Compensation Programs dated December 15 and November 2, 1998 are affirmed.

Dated, Washington, DC
November 15, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member