

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TORUN B. ALMER and DEPARTMENT OF THE INTERIOR,  
BUREAU OF LAND MANAGEMENT, Sacramento, CA

*Docket No. 01-393; Submitted on the Record;  
Issued May 15, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128(a).

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>1</sup> As appellant filed the appeal with the Board on November 20, 2000, the only decision before the Board is the Office's August 23, 2000 decision, denying appellant's request for reconsideration.

The Office accepted appellant's claim for allergic vascular reaction secondary to tobacco smoke and temporary left arteritis. Appellant stopped working on March 23, 1988 and resigned on May 20, 1988. Since her resignation, she did some secretarial jobs with private employers but remained on total disability.

In a report dated February 26, 1997, the second opinion physician, Dr. Ajit S. Arora, a Board-certified internist, considered appellant's history of injury, reviewed the medical records and diagnostic tests and performed a physical examination. He stated that appellant suffered from IgE mediated allergic diathesis which he described as sensitization to environmental allergens which occurs with formation of antigen specific IgE antibodies. Dr. Arora stated that if one accepted the hypothesis that exposure to environmental tobacco smoke (ETS) caused appellant's condition, than such exposure could only have caused temporary and reversible exacerbation of symptoms of asthma, rhinitis and sinusitis, and could conceivably trigger a headache. Dr. Arora concluded that he was not able to identify any occupationally-related factors of disability subjectively or objectively.

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<sup>1</sup> *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

By decision dated May 1, 1997, the Office terminated appellant's compensation effective May 24, 1997, stating that her disability resulting from the work-related condition had ceased.

Appellant requested an oral hearing before an Office hearing representative which was held on June 8, 1998.

In a report dated November 15, 1989, appellant's treating physician, Dr. Carl W. Lehman, a Board-certified allergist and immunologist, stated that appellant's sensitivity to tobacco smoke and some other chemical inhalants was permanent and progressively worsening, especially as she was exposed intermittently to such chemicals. He stated that, in appellant's case, the limiting factor which prevented her from working was the severe vascular headaches which she developed when exposed to the chemicals at work.

In a report dated April 9, 1997, Dr. Lehman stated that appellant had two kinds of allergic reactions of the years, asthmatic and idiopathic chemical hypersensitivity syndrome. He stated that appellant might have developed the hypersensitivity syndrome if she had not been exposed to tobacco smoke and chemicals at the workplace but the reality was that she developed the condition while working for the employing establishment, and it was her exposure to tobacco smoke that seemed to initiate the problem. He stated that "once the sensitivity occurs, it is permanent and will not improve."

By decision dated September 16, 1998, the Office hearing representative affirmed the Office's May 1, 1997 decision.

By letter dated June 26, 1999, appellant requested reconsideration of the Office's decision and submitted additional evidence.

In a report dated December 29, 1998, appellant's treating physician, Dr. George M. Ewing, a Board-certified allergist and immunologist, stated that appellant became chemically sensitive in 1979 when she was a federal employee and was exposed continuously and repeatedly to tobacco smoke. He stated that she developed continuing symptoms and was diagnosed as allergic vascular reaction and temporal arteritis. Dr. Ewing stated that due to her health problems appellant moved from California to Hawaii in "a very safe environment that she had helped to build herself." He stated that she had relatively no symptoms as long as she was in her own home which was free of all tobacco smoke, other pollutants and chemicals. Dr. Ewing stated that appellant's sensitized condition was permanent.

In a report dated June 10, 1999, Dr. Alfred R. Johnson, an osteopath, considered appellant's history of injury, performed a physical examination and reviewed diagnostic tests. He diagnosed reactive airway disease with a marked hypersensitivity to cigarette smoke.

By decision dated August 3, 1999, the Office denied appellant's request for modification.

By letter dated May 23, 2000, appellant requested reconsideration of the Office's decision and submitted additional evidence consisting of a lengthy medical report from Dr. Johnson dated March 13, 2000, a report from Dr. Richard C. Heitsch, a Board-certified surgeon, dated April 25, 2000 and a report from Dr. Ewing dated May 15, 2000. In his March 13, 2000 report, Dr. Johnson diagnosed occupational asthma and reactive airway disease,

multiple chemical sensitivity and toxic effect of gases, fumes and vapors. He stated that the diagnosed conditions were directly caused by appellant's employment based on appellant's medical records, medical research into multiple chemical sensitivity, occupational asthma and diagnostic testing." Dr. Johnson stated that ETS and air conditioning consisting of poor ventilation were factors which caused appellant's condition.

Regarding Dr. Arora's report, Dr. Johnson stated that it "seem[ed] very unlikely that [appellant]'s atopy was even an issue as there was no evidence that she was exposed to high molecular weight compounds. He stated, "That being said, her IgE of 143 may be elevated and indicative of allergies, but it is within the normal range as described by Fiedler, Maccia and Kipen (1992)." Dr. Johnson stated that if appellant's condition were caused by allergy, one would expect NasalCrom to stop the symptoms. He stated that, since that was not the case, it appeared that the mast cells were not primarily involved and her difficulties were not related or caused by IgE atopy.

Dr. Johnson stated Dr. Arora's conclusion that it was highly improbable that low-grade exposure to ETS would cause permanent aggravation of any conditions was not consistent with medical literature. He stated that "EPA" (presumably, Environmental Protection Agency) literature "cautions that ETS contains toxic agents and strong irritants. Dr. Johnson stated that Farnham "writes that chronic low-dose exposure to irritants might result in slowly developing but persistent irritant asthma."

In his April 25, 2000 report, Dr. Heitsch stated that his clinic independently tested appellant using provocative testing to evaluate for sensitivity to various allergens and chemicals. He stated he agreed with Drs. Ewing and Johnson that appellant's sensitivities were caused by her prior exposure and precluded any return to that work environment. In his May 15, 2000 report, Dr. Ewing stated that he supported Dr. Johnson's report "wholeheartedly" and believed it gave a clear indication that appellant had a chronic disabling illness as a result of her tobacco smoke sensitivity and the development of all the reactions of multiple chemical sensitivity.

By decision dated August 23, 2000, the Office denied appellant's request for reconsideration.

The Board has reviewed the case record and finds that the Office erred in denying appellant's request for consideration.

To require the Office to reopen a case for merit review under section 8128(a) of Federal Employees' Compensation Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>2</sup> A timely request for reconsideration may be granted if the Office determines that the employee has

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<sup>2</sup> Section 10.606(b)(2)(i-iii).

presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).<sup>3</sup>

The Office erred in denying appellant's request for reconsideration because Dr. Johnson's March 13, 2000 report contains relevant and pertinent new evidence. Dr. Johnson diagnosed multiple chemical sensitivity, reactive airway dysfunction syndrome, occupational asthma and toxicant-induced loss of tolerance. He stated that those industrial diseases were caused by ETS and poor ventilation when appellant worked at the employing establishment and these conditions were permanent. Dr. Johnson also stated that, contrary to Dr. Arora's report, appellant's difficulties were not related or caused by IgE atropy because there was no evidence that appellant was exposed to molecular weight compounds and NasalCrom did not stop the symptoms. He stated that EPA literature and Farnham stated that ETS contains toxic agents and strong irritants and Farnham stated that chronic low-dose exposure to irritants might result in slowly developing but persistent irritant asthma. Because Dr. Johnson's report presented new and pertinent evidence consisting of his opinion that appellant did not have IgE atropy which Dr. Aurora opined appellant had and that appellant developed permanent respiratory ailments based in part on medical literature, the Office should have addressed the merits of appellant's request for consideration.<sup>4</sup> The case must therefore be remanded for the Office to address the probative value of Dr. Johnson's report, further develop the record, if necessary, and issue a *de novo* decision.

The August 23, 2000 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further action consistent with this decision.

Dated, Washington, DC  
May 15, 2002

Alec J. Koromilas  
Member

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

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<sup>3</sup> Section 10.608(a).

<sup>4</sup> Dr. Heitsch's April 25, 2000 report and Dr. Ewing's May 15, 2000 report in which they both agree with Dr. Johnson do not present new and relevant pertinent evidence.