

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BEVERLY H. STOUT and DEPARTMENT OF THE ARMY,
CORPS OF ENGINEERS, Mobile, AL

*Docket No. 03-839; Submitted on the Record;
Issued August 5, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained a medical condition while in the performance of her federal duties.

On February 10, 2000 appellant, then a 43-year-old biologist, filed a claim alleging that she sustained Lyme disease due to a tick bite while she was on a temporary assignment. She claimed that she became aware of the problem on July 12, 1999 and related it to a tick bite she received between July 15 through July 26, 1996, while she was attending a Barrier Island ecology class, which required four to six hours of daily exposure to the tick-infested islands and coastal plains.¹

By letter dated February 25, 2000, the Office of Workers' Compensation Programs requested further factual and medical information. In response appellant submitted a March 2, 2000 letter which repeated an explanation of the nature of her exposure and stated that her treating physician would be submitting medical evidence. Diane Findley, appellant's supervisor from 1991 to 1999, indicated that appellant had jogged regularly but had recently begun to use sick leave due to extreme fatigue.

By decision dated March 31, 2000, the Office rejected appellant's claim finding that she had not established fact of injury. She disagreed with this decision and requested a review of the written record.

¹ During this period appellant found a tick embedded in her abdomen; she removed it and within two days noted that a red weal emerged at the site in a "bull's eye rash." She did not report it promptly because she did not know that a bull's eye rash was symptomatic of Lyme disease. Thereafter, chronic fatigue developed along with urinary tract infections, cardiac arrhythmias and floating joint and muscle pain. In October 1999, appellant developed disequilibrium and loss of balance, visual disturbances, dyslexia, ataxia and tremors. She began treatment with antibiotics and antifungal agents on July 12, 1999.

Following the Office's denial of appellant's claim, it received an April 8, 2000 report from Dr. George Morris McCullars, a Board-certified general practitioner, which stated that appellant had tick exposure in July 1996 while on the North Carolina Barrier Islands and coastal plains. He provided the diagnosis of tertiary Lyme disease, which he initially made on July 8, 1999. Dr. McCullars noted that appellant met the criteria for Lyme disease because she had the clinical symptomatology, a positive Lyme western blot, a strongly positive Lyme urine antigen test and a favorable response to antibiotic therapy.

On November 27, 2000 the Branch of Hearings and Review set aside the Office's March 31, 2000 decision and remanded the case for further development. The hearing representative instructed the Office to obtain missing medical evidence from the 1996 exposure to the first completed medical note of April 30, 1999 and to refer appellant to an appropriate specialist to determine the etiology of her Lyme disease.

Appellant submitted medical progress notes for the period 1996 to April 30, 1999. In reports dated July 1 and August 2, 1999, Dr. McCullars indicated that appellant had multiple medical complaints, including pelvic problems, a low energy level and hip, knee and ankle pain for the preceding six months and he reported that she had mild discomfort to palpation of the suprapubic area. Dr. McCullars noted that appellant's joints were not palpably sore, but indicated that her hips, knees and ankles hurt on a daily basis and noted that she had pain and bleeding on intercourse which he attributed to Lyme disease-related endometritis. He also noted that it was impossible to know whether, statistically, appellant's fieldwork would have given her an increased chance of exposure, but he opined that it was likely that this event, a tick bite, was the etiology of her current chronic conditions.

The Office determined that a second opinion examination was necessary and it referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. William K. Green, an internist without Board certification, for an evaluation.² By report dated March 13, 2001, he noted that appellant experienced a tick bite while working in North Carolina and had noted a spreading erythematous rash that began at the bite site. Dr. Green noted that the rash had cleared without recurring, but indicated that appellant later developed elements of depression and joint pain. He noted that testing revealed positive urinary antigens for Lyme disease, a positive Lyme IgM by western blot and a negative Lyme IgG by western blot and that appellant had received appropriate antibiotic treatment. After reviewing the recent test results, Dr. Green stated that appellant did not and does not have Lyme disease and he opined that she had been fully treated if she did have Lyme disease. He indicated that appellant had been exposed to ticks and possible tick-borne illnesses, but opined that appellant's symptoms represented a constellation of symptoms related to normal aging and he recommended repeated testing for rheumatoid factor (RA), antinuclear antibody (ANA) and thyroid function.

Thereafter, on May 3, 2001 the Office accepted appellant's claim for "Lyme [d]isease, resolved" and stated that no additional treatment would be authorized after March 13, 2001. However, on December 21, 2001 the Branch of Hearings and Review vacated this decision and remanded the case to the Office for further development. The hearing representative instructed

² The Office, however, claimed that Dr. Green was a specialist in infectious diseases.

the Office to seek clarification from Dr. Green with supporting rationale for his conclusion that appellant did not and does not have Lyme disease, particularly in light of the positive testing results noted by Dr. Green.

By letter dated February 4, 2002, appellant requested an evaluation by another physician other than Dr. Green claiming that he was young, inexperienced and had admittedly never diagnosed or treated Lyme disease before. Appellant reiterated her positive laboratory results and noted that they conformed with the Center of Disease Control (CDC) criteria for diagnosing Lyme disease.

Dr. Green reevaluated appellant on March 14, 2002 and found no clear evidence that she had contracted Lyme disease. He noted that, although appellant had a positive serum IgM by western blot in July 1999, a simultaneous IgG by western blot was negative. Dr. Green stated that the tests were taken prior to antibiotic treatment and that an IgM test was not very useful beyond the first month after infection due to its high false-positive rate. He further stated that a Lyme-infected person would have a positive IgG after the first month. Dr. Green noted that testing on March 13, 2001 revealed negative findings for Lyme IgM and IgG testing by western blot. He noted that appellant had many positive Lyme urinary antigen tests including the test of March 11, 2001, but indicated that urinary antigen testing was an unreliable predictor of the disease due to a high false-positive rate in control subjects never exposed to Lyme disease, lack of reliability in interpretation and lack of consistency in results from samples obtained from the same person. Dr. Green concluded that appellant was bitten by a tick in the summer of 1996 but found no compelling physical or laboratory data that suggested Lyme disease as the etiology of appellant's symptoms. The Office also received negative laboratory testing results for IgM and IgG by western blot, dated March 18, 2002.

Based on the subsequent opinion of Dr. Green, on April 23, 2002, the Office rescinded its prior acceptance of appellant's claim. The Office noted that Dr. Green found no compelling evidence that Lyme disease was the etiology of appellant's symptoms and that his opinion constituted the weight of the medical evidence as it was well rationalized, clear and concise and was based on a proper factual and medical background. The Office cited to the law concerning the weight of an impartial medical examiner's opinion and applied it to Dr. Green's second opinion clarification report. Appellant disagreed with this action and requested a review of the written record.

By decision dated November 19, 2002, the hearing representative affirmed the April 23, 2002 decision finding that appellant failed to provide sufficient objective evidence to establish that she sustained a medical condition caused by employment factors. The hearing representative noted that the March 11, 2001 and March 18, 2002 IgM and IgG tests were negative for Lyme disease and that Dr. Green had called into question the validity of the previously positive test results.

The Board finds that the Office did not meet its burden of proof to rescind its acceptance of appellant's Lyme disease condition.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where

supported by the evidence, set aside or modify a prior decision and issue a new decision.³ Pursuant to the Office's regulations, "the Act specifies that an award for or against payment of compensation may be reviewed at any time on the Director's own motion. Such a review may be made without regard to whether there is new evidence or information. If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time and on the basis of existing evidence) may modify, rescind, decrease or increase compensation previously awarded or award compensation previously denied."⁴ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁵ It is well established that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.⁶ This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation.

In the present case, the Office rescinded its acceptance of appellant's Lyme disease condition based upon a clarification report from the second opinion, nonBoard-certified internal medicine practitioner.

The Board, however, finds that, considering that the second opinion practitioner clarified his April 23, 2002 report explaining that he believed that appellant never had Lyme disease and opining that her 1999 positive testing results were meaningless, there exists a conflict in medical opinion evidence between the second opinion practitioner and appellant's treating physician, Dr. McCullars, who diagnosed Lyme disease based upon appellant's symptomatic history and positive laboratory testing results.

Title 5 U.S.C. § 8123(a) states in pertinent part: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." In the present case this appointment of an impartial medical specialist was not done to resolve the existing conflict between Dr. McCullars and Dr. Green. As the conflict in medical opinion evidence was not resolved as directed by the Act, Dr. Green's report does not constitute the weight of the medical evidence of record and does not establish conclusively that appellant does not or did not have Lyme disease, causally related to her federal employment.

Therefore, the Office improperly based its rescission on Dr. Green's second opinion clarification report when a conflict in medical opinion evidence existed. The Office, consequently, did not meet its burden of proof to rescind its prior acceptance of appellant's Lyme disease claim.

³ *Shelly D. Duncan*, 54 ECAB ____ (Docket No. 02-1260, issued January 22, 2003); *Eli Jacobs*, 32 ECAB 1147 (1981).

⁴ 20 C.F.R. § 10.610 (1999).

⁵ See *Shelly D. Duncan*, *supra*, note 3; *Shelby J. Rycroft*, 44 ECAB 795 (1993).

⁶ See *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Harold S. McGough*, 36 ECAB 332 (1984).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated November 19 and April 23, 2002 are hereby reversed.

Dated, Washington, DC
August 5, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member