

**United States Department of Labor
Employees' Compensation Appeals Board**

FLORENCIO D. FLORES, Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL AIR
STATION, Lemoore, CA, Employer**

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**Docket No. 04-942
Issued: July 12, 2004**

Appearances:
Bernard R. Lafer, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

In a letter postmarked February 20, 2004, appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated February 20, 2003 which denied his claim that he sustained spasmodic torticollis in the performance of his federal duties. He also appealed a November 20, 2003 decision in which the Office denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over both the merits of this case and the denial of merit review.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury causally related to factors of employment; and (2) whether the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 31, 2002 appellant, then a 45-year-old aircraft sheet metal mechanic, filed an occupational disease claim alleging that factors of employment caused spasmodic dystonia or

torticollis. In attached statements, appellant indicated that he had been on temporary duty from June 18 to October 6, 2002 at Naval Air Station Lemoore, California, where he performed aircraft modification and repair.¹ Appellant stated that in July 2002 he began experiencing pain on the sides and back of his neck and in August 2002 he began to experience uncontrollable movements of the neck. He stated that he returned to San Diego on October 6, 2002 to attend his mother's funeral in the Philippines, and was there until October 18, 2002. Appellant did not return to work and advised that the muscle contractions and severe pain continued, which prohibited driving and kept him awake. He stated that his job duties involved a lot of movement of the head and neck such as looking up and tilting and further indicated that he was exposed to chemicals in the workplace.

In support of his claim, appellant submitted a report dated October 22, 2002 in which Dr. Kenneth J. Villa, a Board-certified neurologist, noted evaluation of appellant for neck pain with a history of involuntary movement of one month's duration. Physical examination revealed spasmodic torticollis with retrocollis and laterocollis to the right and mild tenderness over the cervical paraspinals and trapezius muscles bilaterally. Dr. Villa stated that appellant needed a magnetic resonance imaging (MRI) study to rule out a lesion in the basal ganglia, noting that appellant demonstrated a facial angioma and could have a possible Sturge-Weber syndrome. He discussed treatment options with appellant. By report dated October 28, 2002, Dr. Michael E. Chambers, Board-certified in internal medicine, noted his review of Dr. Villa's findings.²

By letter dated December 2, 2002, the Office informed appellant that the evidence submitted was insufficient to establish his claim and advised him to provide a medical report including a physician's opinion with medical reasons, on the cause of his condition.

In a statement dated February 11, 2003, appellant further described his temporary job duties, stating that work was done under the belly of the aircraft in very tight areas which involved a lot of movement of his head and neck. He stated that the uncontrollable movements and pain continued. Appellant also submitted a January 24, 2003 report, in which Dr. Franklin H. Dulin, a Board-certified physiatrist, noted appellant's employment as a sheet metal mechanic and recorded presenting complaints of constant twitching of the neck with uncontrollable involuntary movement of the neck muscles, increase in right neck muscle pain down the midback of the neck, constant mild to moderate pain of the strap muscles of the neck, headache, dizziness, numbness of the hands and feet, generalized bodily weakness and fatigue, loss of libido, anxiety, sleep disorder, nervousness and depression. Pain was demonstrated on cervical examination. Dr. Dulin diagnosed cervical sprain/strain, rule out cervical radiculopathy, rule out torticollis. Regarding causal relationship, the physician stated, "[g]iven the fact that patient was asymptomatic until about four weeks prior to the manifestations of twitching neck muscle movement and pain, I would be more inclined to believe that these could all be related to work injury."

¹ Appellant's regular duty station was the Naval Air Depot, North Island Naval Air Station, San Diego, California.

² The record also contains a brief treatment note in which Dr. Chambers diagnosed spasmodic torticollis. The date of the report is illegible.

By decision dated February 20, 2003, the Office denied the claim, finding the medical evidence insufficient to establish causal relationship. On May 8 and July 7, 2003 appellant, through his attorney, requested reconsideration³ and submitted an April 22, 2003 report from Jesse M. Grygorcewicz, Ph.D., a clinical psychologist, who diagnosed major depression, single episode, and anxiety disorder which, he opined, were “directly related to the work-related stress and harassment” appellant received during his federal employment. Dr. Grygorcewicz further diagnosed “orthopedic injuries per medical record.”

In a decision dated November 20, 2003, the Office denied appellant’s reconsideration request on the grounds that the evidence submitted was irrelevant to the instant claim which was orthopedic in nature. The Office noted that appellant had filed a separate claim for an emotional condition.⁴

LEGAL PRECEDENT -- ISSUE 1

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or 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 presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion must be one of reasonable medical certainty, 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.⁵

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁶ Rationalized medical evidence is medical evidence which includes a physician’s rationalized medical opinion on the issue of 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, 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.⁷ Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the

³ Appellant’s attorney initially sent the reconsideration request to the Branch of Hearings and Review of the Office. In a letter dated May 30, 2003, the Office informed appellant’s counsel that an attorney authorization was needed. The Office further advised that appellant should file a separate claim if he was now claiming that he sustained an employment-related psychological condition as the current case was orthopedic in nature.

⁴ The instant claim was adjudicated by the Office under file number 132066923. The emotional condition claim was adjudicated under file number 132092768.

⁵ *Solomon Polen*, 51 ECAB 341 (2000).

⁶ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁷ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.⁸

ANALYSIS -- ISSUE 1

In the instant case, appellant alleged that his federal duties as a aircraft sheet metal mechanic caused the condition of spasmodic dystonia or torticollis.⁹ The Board finds, however, that appellant did not submit evidence sufficient to meet the requirements to establish that he sustained an injury in the performance of duty. The relevant medical evidence of record includes an October 22, 2002 report in which Dr. Villa diagnosed torticollis. However, he did not provide an opinion regarding the cause of appellant's condition, and the Board has long held that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁰ The Board therefore finds that Dr. Villa's opinion is insufficient to meet appellant's burden. While Dr. Dulin advised that the fact that patient was asymptomatic until about four weeks prior to the manifestations of twitching neck muscle movement and pain, he would be "more inclined to believe that these could all be related to work injury," the Board likewise finds this report insufficient. The medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty; however, such opinion should not be speculative or equivocal.¹¹ Moreover, as stated above, the mere fact that a disease or condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.¹² Likewise, medical conclusions unsupported by rationale are of diminished probative value and are insufficient to establish causal relation.¹³ There is also no indication in the record that appellant pursued Dr. Villa's recommendation that an MRI be done to rule out Sturge-Weber syndrome.¹⁴

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his condition was caused by employment.¹⁵ As part of this burden he

⁸ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

⁹ Dystonia is defined as dyskinetic movements due to disordered tonicity of muscles. Torticollis is defined as a contracted state of the cervical muscles, producing twisting of the neck and an unnatural position of the head. Spasmodic torticollis is defined as torticollis due to intermittent dystonia and spasms of neck muscles, particularly the sternocleidomastoid and trapezius muscles. The cause is unknown, although irritation of the accessory nerve has been implicated in some cases. *DORLAND'S ILLUSTRATED MEDICAL DICTIONARY*, 29th edition (2000).

¹⁰ *Michael E. Smith*, 50 ECAB 313 (1999).

¹¹ *Samuel Senkow*, 50 ECAB 370 (1999).

¹² *Ernest St. Pierre*, 51 ECAB 628 (2000); *Dennis M. Mascarenas*, *supra* note 8.

¹³ *Albert C. Brown*, 52 ECAB 152 (2000).

¹⁴ Sturge-Weber syndrome is defined as a congenital syndrome of unknown etiology consisting of a port-wine stain distributed over the trigeminal nerve accompanied by a similar vascular disorder of the underlying meninges and cerebral cortex. *DORLAND'S ILLUSTRATED MEDICAL DICTIONARY*, 29th edition (2000).

¹⁵ *Ernest St. Pierre*, *supra* note 12.

must present rationalized medical opinion evidence showing causal relationship.¹⁶ He did not do so in this case. Appellant therefore did not meet his burden to establish that his torticollis condition was causally related to his federal employment.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case under section 8128(a) of the Federal Employees' Compensation Act,¹⁷ section 10.608(a) of the implementing regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).¹⁸ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.¹⁹ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.²⁰

ANALYSIS -- ISSUE 2

In the case at hand, appellant did not contend that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. With his reconsideration request, appellant submitted a report dated April 22, 2003 in which Dr. Grygorcewicz, a clinical psychologist, diagnosed major depression and anxiety disorder and noted that appellant had orthopedic injuries per the medical records. Section 8101(2) of the Act defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.²¹ The Board has held that a medical opinion, in general, can only be given by a qualified physician.²² As there is no indication that Dr. Grygorcewicz, as a clinical psychologist, is licensed in the state where he practices, or otherwise comes within the definition of a clinical psychologist recognized by the Office, he would not be qualified to render an opinion in this regard.²³ In any event, his report addresses emotional conditions not at issue in

¹⁶ *Solomon Polen*, *supra* note 5.

¹⁷ 5 U.S.C. § 8128(a).

¹⁸ 20 C.F.R. § 10.608(a).

¹⁹ 20 C.F.R. § 10.608(b)(1) and (2).

²⁰ 20 C.F.R. § 10.608(b).

²¹ 5 U.S.C. § 8101(c).

²² *Ricky S. Storms*, 52 ECAB 349 (2001).

²³ *See Jacqueline E. Brown*, 54 ECAB ____ (Docket No. 02-284, issued May 16, 2003).

the orthopedic claim. Consequently, his report is irrelevant to the instant claim.²⁴ Thus, as appellant did not meet any of the necessary regulatory requirements, he was not entitled to a merit review.²⁵

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that his torticollis condition was causally related to federal employment. The Board further finds that the Office properly refused to reopen appellant's claim for merit review.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 20 and February 20, 2003 be affirmed.

Issued: July 12, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

²⁴ The Board further notes that appellant has filed a stress claim that is being adjudicated by the Office separately. *See supra* note 4.

²⁵ *See James E. Norris*, 52 ECAB 93 (2000).