

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

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<b>DANIEL J. BOVE, Appellant</b>	)	
	)	
<b>and</b>	)	
	)	<b>Docket No. 04-1152</b>
<b>FEDERAL AVIATION ADMINISTRATION,</b>	)	<b>Issued: September 14, 2004</b>
<b>JOHN F. KENNEDY AIRPORT, Jamaica, NY,</b>	)	
<b>Employer</b>	)	

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*Appearances:*  
Daniel J. Bove, pro se  
Office of the Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On March 25, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 19, 2003, denying his request for reconsideration of a July 29, 2003 decision. The July 29, 2003 decision denied modification of an August 5, 2002 decision finding that appellant's accepted aggravation of a gastrointestinal condition had resolved by December 5, 1984. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the issues with respect to the gastrointestinal condition.

**ISSUES**

The issues are: (1) whether the Office properly determined that the accepted condition of aggravation of a gastrointestinal condition had ceased as of December 5, 1984 and (2) whether the Office properly found that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

## **FACTUAL HISTORY**

On January 27, 1976 appellant, an air traffic controller, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries in the performance of duty. By decision dated March 20, 1979, the Office accepted a temporary aggravation of a gastrointestinal condition for one week after the January 27, 1976.

In an order dated May 9, 1983, the Board remanded the case for further development. The Board determined that a conflict in the medical evidence existed as to whether the conditions of stomach ulcer, anxiety state and elevated blood pressure were causally related to appellant's federal employment. The Office was directed to refer appellant to an impartial medical specialist for an appropriate opinion and if the specialist found that a condition was temporarily aggravated, the specialist should state when the aggravation ceased.

The Office continued to develop the record with respect to a gastrointestinal condition, an emotional condition and hypertension. In a decision dated September 24, 1985, the Office denied compensation benefits after October 31, 1976. An Office hearing representative, in a decision dated May 8, 1987, found that the Office had not resolved the issue of whether the stomach ulcer condition was causally related to federal employment. The Office selected Dr. Richard Nagler, a Board-certified internist, as an impartial medical specialist. In a report dated May 9, 1988, he opined that appellant did have an aggravation of an ulcer condition in January 1976 and suffered severe emotional trauma.

By decision dated May 11, 1989, the Office accepted a temporary aggravation of a preexisting ulcer condition, which ceased as of October 31, 1976. In a decision dated November 3, 1989, an Office hearing representative set aside the decision and, with respect to the gastrointestinal issue, remanded the case for a clarifying opinion as to the duration of the temporary aggravation. Dr. Nagler submitted a brief report stating there was no evidence of gastrointestinal problems since 1981. By decision dated November 3, 1984, the Office determined that continuing disability for a gastrointestinal disability ceased as of December 31, 1981. The Office also denied an employment-related hypertension and found that an anxiety/depressive condition ceased as of October 1976.

By decision dated August 1, 1995, an Office hearing representative vacated the November 3, 1984 decision. The hearing representative noted the interrelatedness of the claimed conditions and, with respect to the gastrointestinal condition, found that Dr. Nagler did not provide a reasoned medical opinion. The Office referred appellant to Dr. Charles Albert, a Board-certified gastroenterologist, as an impartial medical specialist. In a report dated January 2, 1996, Dr. Albert opined that psychiatric trauma probably caused most of appellant's gastrointestinal complaints.

In a decision dated February 1, 1996, the Office again determined that the employment-related aggravation of an ulcer condition had ceased by 1981. By decision dated August 3, 1996, an Office hearing representative set aside the February 1, 1996 decision and remanded for further development. The hearing representative indicated that the Office should determine when the work-related psychiatric problems had ceased and then request a clarifying report from

Dr. Albert as to the period that the gastrointestinal problems were causally related to employment.

In a report dated February 26, 1997, Dr. Robert Manning opined that appellant's gastrointestinal symptomology was aggravated by emotional trauma in January 1976, but would have resolved when the emotional trauma ceased. By decision dated April 2, 1997, the Office determined that the gastrointestinal aggravation ceased as of January 28, 1976. The Office also found, based on a report by Dr. Robert Derman, a Board-certified psychiatrist, that psychiatric residuals had ceased as of December 4, 1984.

In a decision dated December 22, 1998, an Office hearing representative remanded the case for further development. With respect to the gastrointestinal condition, the hearing representative directed the Office to request clarification from Dr. Albert.<sup>1</sup> By decision dated May 18, 2001, the Office indicated that it was unable to secure a report from Dr. Albert. The Office found that residuals of the gastrointestinal condition had ceased as of December 5, 1984.

In a decision dated April 4, 2002, an Office hearing representative remanded the case for further development on this issue. The hearing representative noted that Dr. Albert had opined that appellant's gastrointestinal problems were related to a psychiatric condition and directed the Office to refer appellant to another impartial specialist on the extent and duration of the gastrointestinal decision. The hearing representative affirmed that the psychiatric condition had resolved by December 5, 1984 and that hypertension was not an employment-related condition.

The Office referred a statement of accepted facts and medical records to Dr. Frank J. Karpowicz, a Board-certified gastroenterologist. In a report dated July 24, 2002, he provided a history and results on examination. Dr. Karpowicz did not discuss Dr. Derman's reports. He indicated that appellant had chronic dyspepsia for years, dyspepsia is not a disabling symptom complex and in 1976 no gastrointestinal complications occurred. Dr. Karpowicz opined that there was "no GI disability established in this case either at the time of the incident or subsequent to it."

By decision dated August 5, 2002, the Office found that Dr. Karpowicz represented the weight of the medical evidence. The claims examiner stated: "it is the opinion of this adjudicator that the Office will maintain that you had some period of disability through December 4, 198[4], even though it is established that the disability did not relate to a condition involving the aggravation of your preexisting gastrointestinal condition." The Office concluded that the accepted condition of aggravation of a gastrointestinal condition ceased no later than December 5, 1984.

In a decision dated July 29, 2003, the Office denied modification of the prior decision. By decision dated November 19, 2003, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

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<sup>1</sup> The hearing representative found that the Office improperly referred appellant to Dr. Manning and should have requested clarification from Dr. Albert.

## LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act,<sup>2</sup> when employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the periods of disability related to the aggravation.<sup>3</sup> Once the Office accepts a claim, it has the burden of proof to establish the date that residuals of the accepted condition have ceased.<sup>4</sup> The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup>

## ANALYSIS -- ISSUE 1

The Board notes that the merit issue before the Board is limited to the gastrointestinal condition. The July 29, 2003 decision denied modification of the August 5, 2002 Office decision, which was limited to the aggravation of a gastrointestinal condition issue. The Board does not have jurisdiction over the hypertension and duration of the psychiatric condition issues discussed in the April 4, 2002 decision of the Office hearing representative.<sup>6</sup>

The Board previously found a conflict in the medical evidence with respect to a gastrointestinal condition. The Board noted that, if a temporary aggravation was established, that duration of the aggravation should be determined. The Office subsequently accepted an aggravation of appellant's gastrointestinal condition, but there remained an unresolved issue as to the duration of the aggravation. The hearing representatives in this case have noted the interrelationship of the psychiatric and gastrointestinal injuries. A December 22, 1998 Office hearing representative decision noted that after the issue of the duration of employment-related psychiatric condition was resolved, the Office should advise Dr. Albert and secure a report as to whether appellant continued to have a gastrointestinal aggravation after the psychiatric condition had resolved.

The Office, however, has been unable to properly resolve the issue. The August 5, 2002 decision found that Dr. Karpowicz represented the weight of the evidence, but his report does not address the issue of the period of any accepted aggravation. He did not discuss Dr. Derman's findings or address the duration of the employment-related aggravation. Moreover, Dr. Karpowicz did not base his decision on the accepted facts in the case. He opined that appellant never had an employment-related gastrointestinal condition, rather than address the duration of the aggravation. The physician's opinion must be based on a proper factual

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Richard T. DeVito*, 39 ECAB 668, 673 (1988).

<sup>4</sup> *See Dawn Sweazy*, 44 ECAB 824, 832 (1993).

<sup>5</sup> *Raymond W. Behrens*, 50 ECAB 221, 222 (1999).

<sup>6</sup> 20 C.F.R. § 501.3(d)(2) limits the Board to review of decisions issued within one year of the filing of the appeal.

background and the statement of accepted facts.<sup>7</sup> The issue in the case is a medical issue and must be resolved by the medical evidence.

The Board finds that Dr. Karpowicz did not resolve the issue presented. It is the Office's burden of proof in this case and the Board finds that the Office did not meet its burden.

In view of the Board's finding, the reconsideration issue will not be addressed. It is also noted that the record contains an Office decision dated March 25, 2004 with respect to a request for reconsideration. This decision, issued while the Board had jurisdiction over the case, is null and void.<sup>8</sup>

### CONCLUSION

The Board finds that the Office failed to meet its burden of proof in determining that the aggravation of a gastrointestinal condition had resolved by December 5, 1984.

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<sup>7</sup> See *Gwendolyn Merriweather*, 50 ECAB 416 (1999). The statement of accepted facts in the record states that the Office accepted a temporary aggravation of a gastrointestinal condition after the "above cited January 27, 1976 incident which we have determined is not compensable." The meaning of this sentence is unclear and the Office should amend the statement of accepted facts to clearly indicate to the reader the accepted conditions in the case.

<sup>8</sup> See *Douglas E. Billings*, 41 ECAB 880, 895 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 19 and July 29, 2003 are reversed.

Issued: September 14, 2004  
Washington, DC

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member