

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

J.S., Appellant

and

**DEPARTMENT OF THE INTERIOR, BUREAU
OF LAND MANGEMENT, Boise, ID, Employer**

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**Docket No. 08-656
Issued: September 9, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 26, 2007 appellant filed a timely appeal from an October 31, 2007 merit decision of the Office of Workers' Compensation Programs which denied his claim for an occupational disease and a nonmerit decision dated December 5, 2007 which denied his request for reconsideration of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim as to both decisions.

ISSUES

The issues are: (1) whether appellant has established that he sustained a respiratory condition as a result of dust exposure in the performance of duty; and (2) whether the Office abused its discretion in denying merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant, a chief ranger, filed an occupational disease claim on September 5, 2007, alleging that he suffered a persistent sore throat and cough following a multiday assignment in Northwest Nevada at the Burning Man Event. The event lasted from August 27 to

September 3, 2007. He asserted that high winds created dust storms which blew fine, powdery playa dust, exposure to which caused his symptoms.

By letter dated September 20, 2007, the Office notified appellant what information was required to substantiate his claim. The letter requested a diagnosis and a listing of specific employment factors alleged to have caused the condition and stated that the medical evidence currently of record did not support a finding that appellant's condition was causally connected to any factor of employment. The letter also contained seven specific questions designed to elicit further medical information from appellant. The questions included a request for a comprehensive medical report from appellant's physician and a statement that appellant was responsible for providing the information necessary to support his claim. On the same date, the Office requested that the employing establishment provide information on the nature and risks of employment-related exposure to airborne irritants.

Appellant responded in an undated letter received by the Office on October 2, 2007. He answered the seven questions posed by the claims examiner but provided no medical reports and instead included a telephone number for his physician.

By decision dated October 31, 2007, the Office denied appellant's claim finding that the claimed events occurred but noting that the Office had received no medical diagnosis to connect the medical condition to his employment.

Appellant requested reconsideration and, by letter dated November 14, 2007, provided a September 7, 2007 progress note of Terry Robbins, M.D., affiliated with St. Luke's Family Health. In the progress note, Dr. Robbins noted a history of coughing for the 10 days prior, reported that appellant had "inhaled a lot of dust" and that "sore throat and cough developed shortly after." On examination, he noted that the lungs were clear and that there was mild nasal congestion. Dr. Robbins diagnosed a cough and noted a "possible URI vs. dust exposure." He noted a follow-up "prn [as needed]."

By decision dated December 5, 2007, the Office denied appellant's request for a merit review.

LEGAL PRECEDENT -- ISSUE 1

The Board's jurisdiction is limited to reviewing the evidence and arguments that were before the Office at the time of its final decision.¹ The Board has no jurisdiction to review evidence that was not before the Office at the time of its final decision.² It is within this framework that this appeal must be decided.³

¹ *Lloyd E. Griffin, Jr.*, 46 ECAB 979 (1995).

² *Ricky Greenwood*, 57 ECAB 441 (2006).

³ The case record currently contains a medical report by Dr. Robbins dated December 18, 2007. However, this report was not before the Office at the time of the October 31, 2007 decision denying the claim or the December 5, 2007 decision denying a merit review. For this reason, the report cannot be considered by the Board in its review of the Office decisions on appeal.

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim.⁴ Appellant's burden includes the submission of a detailed description of the employment factors or conditions which he believes caused or adversely affected the condition or conditions for which compensation is claimed.⁵ An employee who claims an injury in the performance of duty must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. The claimant must also establish that such event or exposure caused an "injury" as defined by the Act and its regulations.⁶ Office regulations define the term "occupational disease or illness" as a condition produced by the work environment over a period longer than a single workday or shift.⁷ Office regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member of function of the body affected.⁸

Neither the fact that the condition became apparent during a period of employment, nor the belief of appellant that the condition was caused or aggravated by employment conditions, is sufficient to establish causal relationship.⁹ Causal relation is a medical question which can only be resolved by the submission of medical opinion evidence.¹⁰ A compensation award may not be based upon speculation, surmise or conjecture; or stated differently, the award must be based upon evidence and where an inference, deduction, or conclusion is drawn, there must be evidence to support the inference, deduction or conclusion. The evidence required, however, is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound and logical. It is not necessary that the evidence be so conclusive as to suggest causal connection beyond all possible doubt in the mind of a medical scientist.¹¹ An opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.¹² 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

⁴ *Mark A. Cacchione*, 46 ECAB 148 (1994).

⁵ *Anne Livermore*, 46 ECAB 425 (1995); *Elizabeth Pinero*, 46 ECAB 123 (1994).

⁶ *O. Paul Gregg*, 46 ECAB 624 (1995).

⁷ *Patricia E. Cummings*, 53 ECAB 623 (2002).

⁸ *David Apgar*, 57 ECAB 137 (2005).

⁹ *Judith A. Peot*, 46 ECAB 1036 (1995).

¹⁰ *Ronald M. Cokes*, 46 ECAB 967 (1995).

¹¹ *Ronald L. Wilson*, 43 ECAB 271 (1991).

¹² *John F. Glynn*, 53 ECAB 562 (2002).

by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹³

ANALYSIS -- ISSUE 1

It is not disputed that appellant attended the Burning Man Event in the course of his duties as a chief ranger and that he was exposed to dust. At the time of the denial of the claim, November 1, 2007, appellant had not submitted any medical evidence of any description. The Office had informed the claimant what additional evidence was necessary and requested that he provide it in a letter dated September 20, 2007. The Office correctly accepted that the incident occurred but also found, correctly, that claimant had not submitted medical evidence sufficient to establish any injury, diagnosis or causal connection.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a), Office 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, pertinent new evidence not previously considered by the Office.¹⁴ Where such evidence or contentions have not been presented, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration.¹⁵ The Board has held that submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.¹⁶

ANALYSIS -- ISSUE 2

When the Office decided appellant's request for merit review, the record contained only the factual evidence establishing that he was exposed to dust while in the course of his duties and the September 7, 2007 medical note of Dr. Robbins. That note did not contain a clear diagnosis because it identified either an upper respiratory infection or irritation by dust exposure as a cause of appellant's condition. The note did not offer a rationalized opinion on whether appellant's condition was caused by any factor related to his employment. For these reasons, the September 7, 2007 note was not relevant to the medical issues raised in appellant's case.

Appellant did not meet any of the three criteria for gaining a reconsideration of the merits of his claim. The Office properly denied the request for reconsideration.

¹³ *Id.*

¹⁴ *Richard Yadron*, 57 ECAB 207 (2005).

¹⁵ *D'Wayne Avila*, 57 ECAB 642 (2006).

¹⁶ *Andrew Kravic*, 57 ECAB 526 (2006).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an employment-related occupational disease or that he was entitled to merit review.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 5 and October 31, 2007 are affirmed.

Issued: September 9, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board