

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

J.S., Appellant

and

**DEPARTMENT OF THE INTERIOR, BUREAU
OF LAND MANAGEMENT, Butte, MT,
Employer**

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**Docket No. 09-1690
Issued: June 7, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 15, 2009 appellant filed a timely appeal from a May 13, 2009 merit decision of the Office of Workers' Compensation Programs denying his occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant established that he sustained polyneuropathy causally related to factors of his federal employment.

FACTUAL HISTORY

On March 9, 2004 appellant, then a 59-year-old seasonal laborer, filed an occupational disease claim alleging polyneuropathy as a result of his exposure to herbicides during his federal employment. He was first aware of his condition on September 15, 1969, but it was not until August 20, 2003 that he realized it was caused by exposure to pesticide used by the employment establishment. In June 2004, he was diagnosed with polyneuropathy. In an attached statement,

appellant listed depression and lethargic collapses beginning in 1965; trembling in 1970; impotence in the mid 1970's and other conditions which he related to polyneuropathy. In April 2004, he became aware of the connection between 2,4-dichlorophenoxyacetic acid (2,4-D) poisoning and his physical symptoms from Dr. Carlos P. Sullivan, a treating physician, and submitted records related to his medical treatment.

On October 12, 2004 the Office informed appellant that the evidence of record was insufficient to establish his claim. He was advised to submit medical and factual evidence within 30 days.

On December 12, 2004 the Office received medical records from Dr. Sullivan. On March 24, 2004 Dr. Sullivan diagnosed possible peripheral neuropathy and seizure disorder. Appellant reported burning sensations in his legs, weakness and exhaustion mostly in his arms, problems with voiding and frequency, no sense of smell and problems sleeping. Dr. Sullivan noted that appellant's symptoms had been progressive since 1971. On August 4, 2004 he advised that appellant's physical symptoms were due to exposure to 2,4-D herbicide in his federal employment. Appellant had worked intermittently from 1962 to 1965 and has had repetitive and direct exposure to herbicide spraying. He currently experienced polyneuropathy, insomnia, chronic pain, severe lethargy, cognitive impairment, chronic sinusitis, seizure like episodes, hypertension, diarrhea and recurrent kidney stones. Physical examination was reported to be normal except for a strongly positive Romberg test.

On December 2, 2005 an Office medical adviser diagnosed probable polyneuropathy with associated depression. He recommended appellant's referral for a second opinion examination.

Appellant was referred to Dr. Dana Headapohl, Board-certified in occupational medicine, who provided a 28-page report dated February 14, 2006 in which he reviewed the statement of accepted facts and history of medical treatment. Dr. Headapohl listed findings on examination and found that there was insufficient evidence to support a causal relationship between appellant's polyneuropathy and any herbicide exposure. He opined that appellant's depression was unrelated to his herbicide exposure. Appellant related that over a three-week period in 1963 he was sprayed many times with 2,4-D herbicide by a helicopter while fighting forest fires and working with a team spraying sagebrush. He also related exposure in June 1962 when a helicopter flew overhead spraying sagebrush. Dr. Headapohl noted appellant's description of his various symptoms and the history of their occurrence beginning with lethargic collapses and depression in 1965. He summarized the medical reports from February 12, 1975 to June 4, 2004. Dr. Headapohl stated that the record contained an extensive history of neck and head injuries, but concluded that appellant's conditions were not caused or contributed to by any 2,4-D herbicide exposure.

In a March 26, 2006 decision, the Office denied appellant's claim. It found that the weight of medical opinion was represented by Dr. Headapohl.

On March 30, 2006 appellant requested an oral hearing before an Office hearing representative that was held on August 9, 2006. In an August 4, 2004 report, Dr. David Buscher, a specialist in environmental medicine, stated that appellant's polyneuropathy was due to exposure to 2,4-D herbicide intermittently from 1962 to 1965. He reported that a 2003 abnormal

nerve conduction study confirmed the diagnosis of polyneuropathy. Dr. Buscher opined that exposure to 2,4-D herbicide resulted in neurotoxicity and that appellant was totally disabled.

In an October 26, 2006 decision, the Office hearing representative affirmed the denial of appellant's claim.

On May 29, 2007 appellant's counsel requested reconsideration and enclosed a May 7, 2007 report from Dr. Buscher who reiterated the diagnosis of polyneuropathy and addressed appellant's symptoms. Dr. Buscher stated that appellant's history of a prior cervical injury, head injury and stroke were irrelevant and not the cause of his polyneuropathy. He provided a reference to medical and toxicological literature documenting phenoxyherbicides as the cause of peripheral neuropathy. On September 6, 2007 Dr. Kaufman stated that he had been treating appellant since 2004 for chronic sinusitis and facial pain. A recent CT scan revealed an inflammatory reactive bone growth of the left ethmoid sinus and involvement of the maxillary sinuses. Dr. Kaufman stated that appellant's herbicide exposure could be the cause of his medical problems.

On September 12, 2007 Dr. Sullivan reported that a skin punch biopsy examination confirmed the diagnosis of severe polyneuropathy. He opined that it was "medically reasonable that the exposure to 2,4-D that you reported in 1962 [to] 1963 is completely responsible for this condition" and "a major factor causing your stroke in 1984."

The Office found a conflict in medical opinion arose between Drs. Sullivan and Buscher, for appellant, and Dr. Headapohl, for the United States. It referred appellant to Dr. Thomas Mulgrew, a Board-certified psychiatrist and neurologist, selected as the impartial medical specialist.

In a September 27, 2007 report, Dr. Mulgrew reviewed the history of appellant's medical treatment and diagnosed polyneuropathy, mild cognitive impairment and anosmia. Appellant's exposure history to 2,4-D herbicide first arose in 1962 and he described heavy dousing. Dr. Mulgrew provided findings on physical examination, noting normal muscle bulk with normal tone and complaints of patchy numbness. Formal sensory testing however was somewhat inconsistent. There was normal gross and fine motor coordination with no resting or action tremors. Dr. Mulgrew reviewed the medical reports of record and the findings by the prior examining physicians. He reviewed studies pertaining to chronic and acute toxicity of 2,4-D by the Environmental Protection Agency (EPA) and the Canada Pest Management Regulatory Agency (PMRA). An employment exposure history provided by appellant indicated that while he was on the ground guiding the helicopters that the 2,4-D herbicide was being sprayed and that "he was doused heavily, meaning 10 dermal exposures per day, for two days in 1962 and three weeks in 1963." Dr. Mulgrew noted that the details of appellant's exposure such as duration and total dosage to 2,4-D herbicide was unknown although appellant "claims to have suffered from essentially an acute dermal exposure in 1962 and 1964." Appellant, however, did not report symptoms involving the primary target organs although he did claim multiple symptoms remote from the initial exposure. Dr. Mulgrew related that appellant did not report symptoms of acute toxicity as described by the EPA or meet the definition for acute toxicity as noted by the PMRA study. In a 2007 study, the PMRA found acute toxicity from 2,4-D herbicide exposure in animal testing included pathological changes in internal organs. Dr. Mulgrew stated that, while

“[e]xtrapolation to human exposure is difficult, but [appellant] does not claim toxicity to the named organ systems cited in these animal studies.” Dr. Mulgrew also noted that appellant did not report any neurotoxic effects. According to the studies conducted by the PMRA, neurotoxic effects in rodents were not evident four days after the high dose single exposure. As appellant did not report acute neurotoxic effects on the primary target organs, such as skin, eyes, pulmonary or renal, Dr. Mulgrew stated that it was reasonable to conclude he was not exposed to doses of 2,4-D sufficient to account for his neurologic symptoms.

Dr. Mulgrew related that, while appellant attributed his various symptoms to 1962 and 1963 2,4-D herbicide exposure, he did not suffer from acute toxicity and his complaints were not accepted in comprehensive, peer reviewed medical literature as effects from 2,4-D. Based on a review of the available peer reviewed literature, the medical treatment records, statement of accepted facts and physical examination, Dr. Mulgrew concurred with Dr. Headapohl that appellant’s polyneuropathy was not employment related. He noted that Buscher’s opinion that appellant’s polyneuropathy was caused by 2,4-D was not supported by the available medical literature or biologic possibility surrounding what is known about 2,4-D and was conjecture on causal relationship.

On November 29, 2007 appellant contended that the evidence of record established his massive exposure to 2,4-D herbicide. He contended that his symptoms were consistent with known effects of the herbicide and, due to his cognitive impairment, he did not bring them to Dr. Mulgrew’s attention during the examination. On January 9, 2008 appellant reiterated his history of exposure and attached affidavits, medical evidence and articles regarding the effects of 2,4-D herbicide exposure.

In a January 23, 2008 decision, the Office affirmed the denial of his claim. It found Dr. Mulgrew’s opinion represented the weight of the medical evidence as the impartial medical examiner.

Subsequent to the January 23, 2008 decision, the Office received medical and factual evidence, including reports from 1973 to 2007, witness statements and articles on the impact of 2,4-D herbicide which were previously submitted and reviewed.

On May 22 and June 19, 2008 appellant’s counsel requested reconsideration. In a July 24, 2004 report, Dr. Buscher noted that appellant was exposed to 2,4-D herbicide during the years 1962 [to] 1965. Appellant reported difficulty writing in the late 1960’s and the loss of deep tendon reflexes in approximately 1972 with trembling, impotence, weakness and lethargy. Dr. Buscher reported that nerve conduction studies revealed appellant had polyneuropathy. The medical history included a head injury at two years, a parachute injury in 1971 resulting in a T10 compression fracture, a 1976 motor vehicle head on collision, chronic back pain, recurrent 1987 episodes of urolithiasis and a 1987 diagnosis of brain damage as a result of physical injury. He opined that appellant’s polyneuropathy and other symptoms “may well be due to his exposure to Phenoxyherbicides.” The “may well be” was crossed out and annotated “are probably due.”

On March 21, 2007 Dr. Buscher reported appellant had chronic leg and arm pain and that his peripheral neuropathy problems were worsening. Dr. Buscher attributed appellant’s health problems to 2,4-D herbicide exposure as “[h]is symptoms are more than consistent with this

exposure, permanent neuropathy, cognitive impairment and chronic sinusitis.” On April 16, 2007 Dr. Buscher reiterated the polyneuropathy diagnosis and treatment of a parasitic infection.

In a September 9, 2008 decision, the Office denied appellant’s request for reconsideration without further merit review.

On December 6, 2008 appellant requested reconsideration. He contended that the Office ignored medical and factual evidence supporting his claim, specifically the Department of Veterans Affairs’ regulations regarding exposure to Agent Orange.

In a December 19, 2008 decision, the Office denied appellant’s reconsideration request without a merit review.

On January 23, 2009 appellant’s counsel requested reconsideration and resubmitted medical and factual evidence, including March 31, 2004 through September 12, 2007 records from Dr. Sullivan, reports from Dr. Buscher for the period July 20, 2004 to October 10, 2008, treatment records dated 2004 and 2005 from Dr. Jonathan A. Bodine, a treating osteopath, and 2005 to 2007 notes from Dr. Kaufman. He also submitted a report from the Department of Agriculture Forest Service on human health and ecological risk assessment of 2,4-D formations and information from the Department of Veterans Affairs regarding Agent Orange exposure.

On December 21, 2009 Dr. E.B. Russo, a Norwegian treating physician, provided physical findings and medical history which included a 1971 parachute injury. He diagnosed chronic pain syndrome and organic brain syndrome due to a prior head injury.

In a May 13, 2009 decision, the Office denied modification, finding that the weight of medical evidence was represented by Dr. Mulgrew.

LEGAL PRECEDENT

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;¹ (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;² and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.³ The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between

¹ *B.B.*, 59 ECAB ____ (Docket No. 07-1402, issued December 6, 2007); *Solomon Polen*, 51 ECAB 341 (2000).

² *Marlon Vera*, 54 ECAB 834 (2003); *Janet L. Terry*, 53 ECAB 570 (2002); *Roger Williams*, 52 ECAB (2001).

³ *A.C.*, 60 ECAB ____ (Docket No. 08-1453, issued November 18, 2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

the claimed condition and identified factors.⁴ The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.⁵

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.⁶ The opinion of the physician must be based on a complete factual and medical background of the claimant,⁷ must be one of reasonable medical certainty⁸ 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.⁹

The Act provides that, if there is a disagreement between a physician making an examination for the United States and the physician of the employee, the Secretary must appoint a third physician to make an examination.¹⁰ Likewise, the implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office must appoint a third physician to make an examination.¹¹ This is called a referee examination and the Office is required to select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.¹² It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.¹³

⁴ *P.K.*, 60 ECAB ____ (Docket No. 08-2551, issued June 2, 2009); *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005).

⁵ *Luis M. Villanueva*, 54 ECAB 666 (2003).

⁶ *Conard Hightower*, 54 ECAB 796 (2003).

⁷ *Tomas Martinez*, 54 ECAB 623 (2003).

⁸ *John W. Montoya*, 54 ECAB 306 (2003).

⁹ *Judy C. Rogers*, 54 ECAB 693 (2003).

¹⁰ 5 U.S.C. §§ 8101-8193, 8123(a). See also *J.J.*, 60 ECAB ____ (Docket No. 09-27, issued February 10, 2009); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹¹ 20 C.F.R. § 10.321. See *Elaine Sneed*, 56 ECAB 373 (2005).

¹² 20 C.F.R. § 10.321. See *R.H.*, 59 ECAB ____ (Docket No. 07-2124, issued March 7, 2008); *Elaine Sneed*, 56 ECAB 373 (2005).

¹³ *B.P.*, 60 ECAB ____ (Docket No. 08-1457, issued February 2, 2009); *J.M.*, 58 ECAB 478 (2007); *Bryan O. Crane*, 56 ECAB 713 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

ANALYSIS

The Office accepted that appellant was employed as a seasonal worker and was exposed to the herbicide 2,4-D during several sagebrush spraying projects. The issue is whether appellant's exposure caused his claimed neuropathy or other disease.

Appellant submitted medical evidence in support of his claim from Dr. Buscher and Dr. Sullivan who attributed appellant's symptoms to peripheral and central nervous system involvement due to the accepted exposure. The Office developed the claim by referring appellant to Dr. Headapohl who found that there was insufficient evidence to establish that the causal relationship between appellant's polyneuropathy and any herbicide exposure. It properly referred appellant to Dr. Mulgrew on September 13, 2007 to resolve the conflict in medical opinion.

In a September 27, 2007 report, Dr. Mulgrew reviewed appellant's history of herbicide exposure, medical treatment and reviewed several studies pertaining to the chronic effects of exposure to 2,4-D. He diagnosed polyneuropathy, mild cognitive impairment and insomnia. Dr. Mulgrew found that appellant's polyneuropathy was not related to the 2,4-D herbicide exposure in 1962 and 1963. Although the exact duration and dosage of appellant's exposure was unknown, appellant failed to meet the definition of acute toxicity based studies performed by the EPA and PMRA due to the lack of symptoms involving known primary target organs. Appellant did not report any acute neurotoxic effects within a few days of exposure and that appellant's chronic conditions could be attributed to his prior motor vehicle accident, parachute accident and encephalopathy. Dr. Mulgrew advised that appellant's exposure to the herbicide was not sufficient to account for his neurologic symptoms. He stated that "none of his symptoms are accepted in comprehensive, peer reviewed medical literature as effects from 2,4-D." Dr. Mulgrew stated that, based upon a review of the available peer reviewed literature, a review of the medical evidence, statement of accepted facts and physical examination, that he concurred with Dr. Headapohl that appellant's polyneuropathy was not employment related. He characterized Dr. Buscher's opinion on causal relationship as speculative and conjecture.

The Board finds that Dr. Mulgrew's impartial medical opinion negated the causal relationship between appellant's diagnosed polyneuropathy and exposure to 2,4-D herbicide in his federal employment. The physician based his opinion on a thorough review of the medical records, factual background of chemical exposure and studies pertaining to the known effects of the chemical agent. His report is well rationalized and based upon an accurate factual and medical background. Therefore, Dr. Mulgrew's opinion is entitled to the special weight of an impartial medical examiner.¹⁴ Based on his report, the Office found that appellant did not establish his claim for compensation.

Following the January 23, 2008 decision, appellant submitted additional medical and factual evidence. However, he did not submit sufficient medical evidence to overcome the

¹⁴ See *Y.A.*, 59 ECAB ____ (Docket No. 08-254, issued September 9, 2008); *Darlene R. Kennedy*, *supra* note 10 (when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight).

special weight accorded to Dr. Mulgrew's opinion. Additional reports from Dr. Buscher reiterated the diagnoses previously addressed and reiterated the physician's opinion on causal relation. These additional reports are not of sufficient probative value to create a new conflict or overcome the weight accorded Dr. Mulgrew.¹⁵

Dr. Kaufman diagnosed thrush, chronic sinusitis, throat pain and atypical face pain. Dr. Russo diagnosed chronic pain syndrome and organic brain syndrome, but made no mention of appellant's 2,4-D herbicide exposure. Dr. Bodine diagnosed polyneuropathy, depression, hypertension and odynophagia without providing an opinion as their cause. He also diagnosed brain damage in 2004 that might be related to insecticide or a motor vehicle accident. None of these reports adequately address the cause of appellant's various symptoms or attribute the conditions to 2,4-D exposure. Reports which fail to offer an opinion as to the cause of a medical condition are of diminished probative value.¹⁶ This evidence is insufficient to create a conflict with Dr. Mulgrew. Dr. Sullivan reiterated his opinion that appellant's depression and polyneuropathy were due to 2,4-D herbicide exposure, but he provided insufficient rationale in support of his stated conclusion. The Board has held that medical reports are of limited probative value on the issue of causal relationship if they contain a conclusion regarding causal relationship which is unsupported by medical rationale.¹⁷ The Board finds that the special weight of the medical evidence rests with Dr. Mulgrew as the impartial medical specialist. He found that appellant's polyneuropathy was not caused or contributed to by his accepted exposure to 2,4-D herbicide.

Appellant submitted various articles about Agent Orange and 2,4-D in support of his claim. However, these articles generally have no evidentiary value in establishing the causal relationship between his claimed condition and federal employment. Such materials are of general application and are not determinative of whether a specific condition claimed is related to particular employment factor or incident.¹⁸ Appellant also submitted information from the Department of Veteran Affairs and the Department of Agriculture Forestry Service. This

¹⁵ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *see also Dorothy Sidwell*, 41 ECAB 857 (1990) (the Board notes that reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner, or to create a new conflict).

¹⁶ *K.W.*, 59 ECAB ____ (Docket No. 07-1669, issued December 13, 2007); *Robert Broome*, 55 ECAB 339 (2004).

¹⁷ *S.S.*, 59 ECAB ____ (Docket No. 07-579, issued January 14, 2008); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *see also Sedi L. Graham*, 57 ECAB 494 (2006) (medical form reports and narrative statements merely asserting causal relationship generally do not discharge a claimant's burden of proof).

¹⁸ *E.A.*, 58 ECAB 677 (2007); *Gloria J. McPherson*, 51 ECAB 441 (2000).

information from other federal agencies is not dispositive with regard to appellant's claim arising under the Act.¹⁹

CONCLUSION

The Board finds appellant did not establish that his polyneuropathy or other medical conditions were caused or contributed to by his exposure to 2,4-D during his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 13, 2009 is affirmed.

Issued: June 7, 2010
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹⁹ *S.E.*, 60 ECAB ____ (Docket No. 08-2214, issued May 6, 2009) (Scientific studies, like medical literature, have probative value only to the extent they are interpreted by a physician rendering an opinion on causal relationship); *see also D.I.*, 59 ECAB ____ (Docket No. 07-1534, issued November 6, 2007); *Henry C. Garza*, 52 ECAB 205 (2001) (Newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship as they are of general application and are not determinative of whether the specific condition claimed was causally related to the particular employment factors alleged).