



## **FACTUAL HISTORY**

This case was previously before the Board.<sup>2</sup> By decision dated May 17, 2006, the Board vacated an October 5, 2005 Office decision which denied appellant's reconsideration request on the basis it was untimely filed and did not establish clear evidence of error. The Board found that he had timely requested reconsideration and remanded the case to the Office to review the evidence under the proper standard of review. The findings of fact and conclusions of law from the prior decision are incorporated by reference.

In a July 19, 2006 decision, the Office denied modification of its prior decision finding that the medical evidence was insufficient to establish that appellant's claimed West Nile virus was causally related to his employment duties. It found that, while he was frequently exposed to work environments conducive to the presence of mosquitoes, the medical evidence failed to provide a definitive opinion that his West Nile virus was due to a mosquito bite occurring while at work.

In a July 15, 2007 letter, appellant requested reconsideration of the Office's decision. He submitted an undated document from Deb Landis with appellant's comments attached; a July 15, 2007 statement; a July 16, 2007 statement from John Friedt, a coworker; Quick Facts about West Nile Virus; HealthLine regarding West Nile Virus; a July 10, 2007 document from Alvin Graba; a July 6, 2007 letter from Brad Kohlhagen of Purdue University; a July 11, 2007 medical report from Ralph Hecht, a veterinarian; a July 16, 2007 document from Dr. H.S. Lee, a general surgeon; a March 13, 2007 medical report from Dr. Jody M. Neer, a Board-certified neurologist, and an undated statement of his employment history. Dr. Neer noted findings on examination and he opined that appellant's symptoms were clearly due to West Nile virus encephalitis that was acquired through a work-related project.

By decision dated August 2, 2007, the Office denied modification of its previous decision finding that the medical evidence on causal relationship was insufficient to establish the claim.

In a July 23, 2008 letter, appellant requested reconsideration. He stated that legal counsel advised him that when a person worked in an area that was termed an epidemic area for a disease and a person was diagnosed with that disease, causal relationship did not apply. In a July 30, 2008 report, Dr. Neer diagnosed cognitive impairment secondary to West Nile virus encephalitis, hyperlipidemia and hypertension.

By decision dated September 17, 2008, the Office denied modification of its prior decisions. It advised appellant that matters under the Federal Employees' Compensation Act causal relationship was a medical issue that required his physician to provide a well-rationalized opinion on causal relationship. The Office further found that Dr. Neer's July 30, 2008 report did not provide any discussion on the cause of appellant's condition.

In a September 8, 2009 letter, appellant requested reconsideration. He indicated that he had been instructed by the Office to submit his questions in writing but had received any response. Appellant explained that he submitted 117 pages and listed many questions, but they

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<sup>2</sup> 57 ECAB 593 (2006).

were not answered. He stated that he was resubmitting statements from Dr. Hecht dated July 11, 2007 and Dr. Larry Smith dated July 16, 2007, which were on page 55 and 56 of his prior submission, which supported the prevalence of the disease in the area he believed responsible for his condition. He argued that legal counsel had advised him that, even though he could have been bitten by a mosquito anywhere, it was different when exposed and working directly in an area where the disease was prevalent and spreading. Appellant referenced the documentation previously submitted by veterinarians and landowners to substantiate that the West Nile virus was in the area where he worked.

In a September 1, 2009 report, Dr. Neer noted that he first examined appellant in 2006 and most recently in June 2009. Previous notes outlined appellant's neurological history regarding West Nile virus encephalitis and cognitive impairment. Dr. Neer stated "although I was not there in 2002 when he contracted the infectious illness, I do strongly suspect he acquired the infection on the job."

By decision dated September 24, 2009, the Office denied appellant's request for reconsideration on the grounds the evidence submitted was insufficient to warrant further merit review of his claim.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>4</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>5</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>6</sup>

### **ANALYSIS**

The Office denied appellant's claim on the grounds that the medical evidence of record was not sufficient to establish that the claimed medical condition was causally related to appellant's employment. Appellant's reconsideration request did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. While appellant

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<sup>3</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b)(2).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(b).

noted that his questions were not addressed by the Office, he did not assert a point of law had been erroneously applied or misinterpreted by the Office. He stated that he was advised by legal counsel that while he may have been bitten by a mosquito at a different location, it was different when he was exposed and working in an area where the disease was prevalent and spreading. This argument, however, is not a new relevant legal argument as it was previously considered by the Office in its September 17, 2008 decision.<sup>7</sup> Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also did not submit relevant and pertinent new evidence not previously considered by the Office. He referenced reports from Dr. Hecht and Dr. Smith dated July 16, 2007 and provided a copy of Dr. Hecht's report. However, these reports were previously of record and considered by the Office in its August 2, 2007 decision. As this evidence was duplicative or cumulative in nature it was insufficient to warrant further merit review.<sup>8</sup> These medical reports did not require reopening the record for a merit review. In a September 1, 2009 report, Dr. Neer stated that he strongly suspected appellant acquired the West Nile virus infection on the job. This report, while new, is cumulative as it addresses causal relationship in the same manner as in the physician's previously submitted March 13, 2007 report. Therefore, while Dr. Neer's September 1, 2009 report is new, it is repetitive of his March 13, 2007 report.<sup>9</sup> Consequently, appellant is not entitled to a merit review based on the third criterion, noted above.

Because appellant has not satisfied any of the above-mentioned criteria, the Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim.

On appeal, appellant requests that his questions be addressed. He contended that he was being treated unfairly as he had established the West Nile virus was prevalent in the area he worked and the doctors supported his claim. As noted, the Board does not have jurisdiction over the merits of this case. The issue is whether the Office properly denied appellant's request for merit review. For reasons stated, the Board finds that he is not entitled to further review of the merits.

### **CONCLUSION**

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

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<sup>7</sup> Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case. *C.N.*, 60 ECAB \_\_\_ (Docket No. 08-1569, issued December 9, 2008).

<sup>8</sup> *See id.*; *Denis M. Dupor*, 51 ECAB 482 (2000).

<sup>9</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs decision dated September 24, 2009 is affirmed.

Issued: January 7, 2011  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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