

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

J.H., Appellant

and

**DEPARTMENT OF COMMERCE, NATIONAL
OCEANIC & ATMOSPHERIC
ADMINISTRATION, Wallops Island, VA,
Employer**

**Docket No. 10-834
Issued: May 17, 2011**

Appearances:

*Katharine O. Porwick, Esq., for the appellant
Office of Solicitor, for the Director*

Oral Argument March 2, 2011

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 3, 2010 appellant, through his representative, filed a timely appeal from a September 22, 2009 Office of Workers' Compensation Programs' merit decision which denied his claim for a traumatic injury. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a traumatic injury in the performance of duty.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 12, 2007 appellant, then a 45-year-old information technology specialist team leader, filed a traumatic injury claim alleging that on January 9, 2007 he was exposed to dangerous levels of radio frequency radiation when checking for a waveguide leakage which caused vision and hearing damage and burns to the left hand, arm and fingers. Appellant did not stop work but began restricted duties.

Appellant was initially treated by Dr. Jeffrey Benner, a Board-certified ophthalmologist, who submitted a January 12, 2007 attending physician's report that diagnosed unspecified vision loss due to abnormal exposure to infrared radiation sources. Dr. Benner checked a box "yes" that the condition was caused or aggravated by work activity and noted that the exposure occurred at work. In a report of the same date, he noted that appellant presented with eye pain which was worse in light, headaches and ear and hand pain. Appellant reported being exposed to an infrared radiation source at work.

On March 2, 2007 the Office advised appellant of the factual and medical evidence needed to establish his claim. In a letter of the same date, it requested that the employing establishment comment on appellant's allegations.

In a January 15, 2007 report, Dr. Mitchell Gittelman, an osteopath, treated appellant for a numbing sensation of the fingers and left hand, a cupping sensation in the left ear and glassy eyes. He reported microwave exposure at work due to faulty equipment installation. Dr. Gittelman diagnosed rhinitis, numbness and radiation exposure. On January 16, 2007 appellant was treated by Dr. W. Charles Schaeffer, a Board-certified otolaryngologist, for left ear pain and hearing problems after workplace radiation exposure. Appellant reported being exposed to radiation for about one hour and noted skin changes on his left side and vision changes. Dr. Schaeffer noted a normal ear examination with bilateral high frequency hearing loss. He opined that appellant's hearing loss was not related to his radiation exposure but due to noise exposure over a number of years.

The employing establishment submitted a January 12, 2007 incident report which noted that on January 9, 2007 appellant was exposed to high levels of radio frequency radiation due to faulty equipment and experienced vision and hearing damage on the left side, pain in the left arm, fingers and joints and skin burn. After the incident, a bolt was installed and safety procedures were drafted. Also submitted was a job description for an information technology specialist team leader.

In a decision dated April 16, 2007, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that his conditions were caused by his employment duties.

Appellant requested an oral hearing which was held on October 5, 2007. He submitted treatment records from Dr. Gittelman on January 10 and 15, 2007 for radiation poisoning that occurred at work. Dr. Gittelman noted appellant experienced numbing sensation of the fingers and hands and a cupping sensation of the ears after exposure to microwaves due to faulty installation of equipment. He diagnosed rhinitis, numbness and radiation exposure. Appellant

was treated by Dr. Jeffrey Gaber, a Board-certified internist, on October 11, 2007. He noted a history of exposure to nonionizing radiation for one hour while working on a satellite transmitter. Dr. Gaber noted symptoms of facial skin burn, tremulousness, tinnitus and nausea. He opined that appellant sustained permanent impairment due to his workplace exposure to radiation.

The employing establishment submitted a memorandum dated August 27, 2007 which noted that a radio frequency radiation safety policy was enacted effective September 1, 2007 after the radio frequency radiation exposure incidents. In a November 5, 2007 statement, the employing establishment noted that on January 9, 2007, while surveying a shelter housing radio frequency transmitters, appellant reported finding a radio frequency leak at a backup site. Appellant reported the leak to his supervisor and was instructed to shutdown the transmitters and disable the radio frequency power.

In a decision dated December 5, 2007, the hearing representative affirmed the April 16, 2007 decision.²

On September 8, 2008 appellant requested reconsideration. He submitted a June 12, 2008 brain emission tomography report from Dr. J. Michael Uszler, a Board-certified radiologist. It revealed a hypoperfusion pattern of the temporal and frontal lobes that might be secondary to a closed head trauma or exposure to neurotoxic or neuroimmunologic processes and a hyperperfusion pattern of the basal ganglia associated with anxiety tendencies. A June 20, 2008 report from Cindy Sage, an agricultural and environmental consultant, concluded that appellant was exposed to excessively high radio frequency radiation for 50 to 60 minutes at levels that significantly exceeded the legal maximum permissible. She noted that appellant's symptoms were consistent with those identified in published studies on radio frequency microwave radiation injury.

In a July 22, 2008 report, Dr. Gunnar Heuser, an internist specializing in neurotoxicology and immunotoxicology, noted a history of appellant's exposure to radio frequency radiation. On examination, he noted bilateral fine postural tremors and impaired balance. Dr. Heuser opined that appellant experienced nonionizing radiation at the time of his January 9, 2007 accident and developed acute and chronic symptoms and multisystem impairment as a result of this exposure. He diagnosed radiation-induced encephalopathy, radiation-induced polyneuropathy and radiation-induced cataracts. In an October 17, 2008 report, Dr. Heuser noted that, after his radiation exposure, appellant became disabled when his brain and peripheral nerve functions were impaired. He noted that a brain function test was significantly abnormal and typical of neurotoxic exposure and psychological testing revealed impaired cognitive functions. Dr. Heuser opined that appellant became disabled after the incident of January 9, 2007 causally related to radiation exposure and would not be able to function at the high level of cognitive functioning that he enjoyed prior to his exposure. Appellant underwent a microcog test on August 4, 2008, which evaluated his brain functions and revealed severe memory deficit. A test of variables of attention (TOVA) dated August 4, 2008 revealed slow cognitive time presumptive of brain injury.

² On December 12, 2007 appellant appealed to the Board. On September 8, 2008 appellant requested that his appeal be dismissed so that he could pursue reconsideration before the Office. On September 25, 2008 the Board dismissed the appeal. Docket No. 08-611.

The employing establishment submitted a National Institute for Occupational Safety and Health (NIOSH) report prepared after a health hazard evaluation of March 2007 following two incidents in which employees believed they were exposed to radio frequency radiation. The investigators noted reviewing a February 2007 report after a radio frequency survey was conducted which revealed two measurements which exceeded the NIOSH standards for safety in the waveguide area and near the auxiliary triplexer. The NIOSH investigators noted that a lack of consistent training among the technicians for repairs they were expected to perform, inconsistent documentation of the repairs performed and a lack of adherence to facility policy for immediate medical evaluation after suspected radio frequency exposure. The investigators further noted that there was no evidence of ongoing radio frequency exposure to technicians.

On December 11, 2008 the Office referred appellant for a second opinion to Dr. Michael S. Miller, a Board-certified neurologist. It provided Dr. Miller with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.³ In a December 29, 2008 report, Dr. Miller noted examining appellant, reviewing his records and set forth a history of appellant's condition. He noted that a diagnosis was not established and the reported symptoms and neurological examination demonstrated no evidence of left cerebral dysfunction or lateralized polyneuropathy. Dr. Miller opined that a considerable supratentorial component existed making appellant's evaluation difficult but noted that no prominent objective abnormalities were appreciated on neurological examination and there was no neurological evidence of disability based on examination. He found that appellant was not totally disabled on a physical basis and there was no objective evidence of physical limitations due to the January 9, 2007 incident.

On January 28, 2009 the Office referred appellant for a second opinion to Dr. Ross S. Meyerson, Board-certified in occupational medicine. In a February 13, 2009 report, Dr. Meyerson noted examining appellant and provided a history of appellant's treatment. He noted that a diagnosis was not established and made no objective clinical findings of neurologic impairment or injury. Dr. Meyerson opined that appellant's symptoms may be due to a psychiatric condition, somatoform disorder, in which numerous objective complaints were unresponsive to objective findings. He noted that there was no evidence of total disability due to organic illness and no objective physical limitations.

The Office found a conflict of medical opinion. Dr. Heuser, appellant's physician, found that appellant developed acute and chronic symptoms and multisystem impairment as a result of exposure to nonionizing radiation on January 9, 2007 at work and diagnosed radiation-induced encephalopathy, polyneuropathy and cataracts and was totally disabled. Drs. Miller and Meyerson, Office referral physicians, determined that a firm medical diagnosis was not established, that there were no objective findings of neurologic impairment and that appellant could return to his preinjury position without restrictions.

³ The statement of accepted facts estimated that appellant was exposed, in a 10 by 12 foot room, to radio frequency radiation of at least 20 milliwatts per square centimeter for one hour and for one-half hour he was very close to the radiation leak.

On July 27, 2009 the Office referred appellant to a referee physician, Dr. Christian E. Jensen, a Board-certified neurologist with a specialty in toxicology.⁴ In a report dated August 14, 2009, Dr. Jensen reviewed the records provided to him and examined appellant. He reviewed appellant's job requirements, noted a history of appellant's condition and reviewed treatment after the injury. Dr. Jensen noted appellant's complaints of headaches, tingling and numbness in the left hand and face, weakness on the right side, forgetfulness, hearing loss and clumsiness. He noted findings upon examination of intact cranial nerves, normal oropharynx, normal cardiovascular system and respiratory system, normal grip strength, full range of motion of the upper and lower extremities, normal reflexes and normal range of motion of the lumbar and cervical spine. Dr. Jensen advised that a diagnosis of a work-related injury was not established and the symptoms and examination did not support the diagnosis of left cerebral dysfunction or neuropathy from exposure to microwaves. He diagnosed migraine headaches and opined that this was not medically connected to appellant's work injury. Dr. Jensen opined that appellant's migraine condition was improved and he was no longer totally disabled as of August 14, 2009. He recommended appellant return to work in a progressive manner and felt that the prognosis was good for a return to full duty within three months. Dr. Jensen advised that current work limitations related to appellant's long period of inactivity as he had become physically deconditioned and adopted sick behavior. Appellant's migraine symptoms and other complaints deserved to be evaluated by a neurologist and recommended a referral be made.

Appellant submitted a May 4, 2009 report from Kirsten Culler, a social worker and counselor. She diagnosed mood disorder with major depressive likely episode due to radiation-induced encephalopathy, polyneuropathy and cataracts. In a June 1, 2009 report, Dr. Glenwood Brooks, Jr., a licensed clinical psychologist, treated appellant for depressive defects associated with his circumstances. He diagnosed possible traumatic brain disorder and post-traumatic stress disorder by history. Dr. Brooks opined that appellant sustained a probable injury based on published studies of radiation exposure.

In a decision dated September 22, 2009, the Office denied modification of the December 5, 2007 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Act⁵ has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to

⁴ On December 29, 2008 the Office referred appellant to Dr. John B. Parkerson, Jr., Board-certified in occupational medicine, to resolve the medical conflict. After appellant objected to the selection due to questions about Dr. Parkerson's expertise in radiation exposure, the Office inquired about Dr. Parkerson's qualifications to render a medical opinion about radiation exposure. Thereafter, Dr. Parkerson declined to conduct the referee examination.

⁵ 5 U.S.C. §§ 8101-8193.

the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.⁶

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁷ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.⁸

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁹

ANALYSIS

The Office accepted that the claimed radiation exposure occurred on January 9, 2007 but it denied appellant's claim, finding that the medical evidence did not establish that the exposure caused an injury. On appeal, appellant contends that the August 14, 2009 report of the referee physician, Dr. Christian Jensen, was insufficient to resolve the conflict of opinion with regard to whether he developed vision and hearing damage or burns on the left hand, arm and fingers after he was exposed to radio frequency radiation at work. He asserted that Dr. Jensen did not have the technical or specialized foundation in radiation exposure to render a medical opinion which would resolve the conflict of opinion in this case.

The Office found that a conflict in the medical evidence arose between appellant's attending physician, Dr. Heuser, who found that the workplace exposure caused diagnosed conditions and disability, and Drs. Miller and Meyerson, Office referral physicians, who determined that a work-related condition was not established. Consequently, the Office referred appellant to Dr. Jensen to resolve the conflict.

The Board finds that Dr. Jensen's report is insufficient to resolve the conflict of opinion. In his report of August 14, 2009, Dr. Jensen noted that the diagnoses of a work-related injury was not established and the symptoms and examination did not support the diagnosis of left cerebral dysfunction or neuropathy on exposure to microwaves. He diagnosed migraine headaches and opined that this condition was not medically connected to his work injury.

⁶ Gary J. Watling, 52 ECAB 357 (2001).

⁷ Michael E. Smith, 50 ECAB 313 (1999).

⁸ *Id.*

⁹ Aubrey Belnavis, 37 ECAB 206 (1985). See 5 U.S.C. § 8123(a).

Dr. Jensen failed to explain whether appellant's radio frequency radiation exposure on January 9, 2007 caused vision, hearing or burn conditions in light of Dr. Heuser's July 22 and October 17, 2008 reports which diagnosed radiation-induced encephalopathy, polyneuropathy and cataracts as a result of exposure to nonionizing radiation on January 9, 2007. Dr. Jensen's reports merely referenced Dr. Heuser's reports. In his discussion, Dr. Jensen did not explain or distinguish Dr. Heuser's diagnosis and opinion on causal relationship.¹⁰

Similarly, Dr. Jensen noted that over-exposure to radio frequency radiation of the magnitude expressed was not known to cause anything other than superficial temporary thermal injuries. He opined that there was no relationship between appellant's radio frequency radiation and his migraine headaches. However, it is unclear where Dr. Jensen obtained the background information upon which he relied to make this determination regarding the effects of over-exposure to radio frequency radiation as this information was not provided in the statement of accepted facts and the physician failed to cite any medical or occupational authority in explaining the basis of this conclusion. The Board also notes that Dr. Jensen recommended further medical development, stating that appellant's migraine symptoms and other complaints deserved to be evaluated by a neurologist. The Office failed to address this recommendation or refer appellant for further medical evaluation as recommended by the referee physician. Because of these deficiencies, the Board finds that Dr. Jensen's reports are not sufficient to resolve the conflict of opinion in this case.

The Board will set aside the Office's September 22, 2009 decision and remand the case for proper development of the medical evidence to resolve the outstanding conflict in the medical evidence. Due to the complexity of this case, which involves exposure to radio frequency radiation and several claimed conditions, a multispecialty evaluation would be appropriate to resolve the medical conflict. The Office should refer appellant, with a statement of accepted facts and the case record, to an appropriate multidisciplinary panel to resolve the conflict of opinion.¹¹ After such further development as may be required, the Office shall issue an appropriate final decision on appellant's claim for a traumatic injury.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁰ See *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

¹¹ *Larry B. Guillory*, 45 ECAB 522 (1994) (where the Office determined that due to the complexity of the issues involved that a referral to a multidisciplinary panel of physicians was required to resolve the medical conflict); *Mohamed Yunis*, 42 ECAB 325 (1991) (where the Office referred appellant to a panel of physicians consisting of an orthopedic surgeon, a neurologist and a psychiatrist for evaluation); *Marcia E. Jones*, 40 ECAB 720 (1989) (where the Office referred appellant to a panel of physicians to resolve a medical conflict).

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2009 decision of the Office of Workers' Compensation Programs is set aside and remanded for proceedings consistent with this decision.

Issued: May 17, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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