

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

C.S., Appellant)

and)

DEPARTMENT OF HEALTH & HUMAN)
SERVICES, NATIONAL DISASTER MEDICAL)
SERVICES, Bethesda, MD, Employer)

**Docket No. 14-1994
Issued: June 26, 2015**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 16, 2014 appellant, through his attorney, filed a timely appeal of an August 21, 2014 Office of Workers' Compensation Programs' (OWCP) nonmerit decision denying further merit review. The most recent merit decision was issued by the Board on April 24, 2014, which became final after 30 days of issuance and is not subject to further review. The Board lacks jurisdiction to review the merits of appellant's case, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c), 501.3, and 501.6(d).

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on appeal. A review of the facts follows. On July 31, 2011 appellant then a 64-year-old health technician/paramedic filed an occupational disease claim alleging that he had developed necrotizing fasciitis, clostridium septicum due to factors of his federal employment. He stated that he returned from a two-week deployment in Haiti on January 30, 2010 and was diagnosed with strep throat. Appellant stated that periodically after that he developed multiple episodes of uncontrolled fevers and on July 2, 2011 received a diagnosis of necrotizing fasciitis.

In a report dated September 8, 2011, Dr. Robert E. Hruby, a Board-certified surgeon, stated that he first examined appellant on July 2, 2011 with necrotizing fasciitis and myonecrosis secondary to clostridium perfringens infection. He stated that appellant developed multisystem organ failure and required treatment for respiratory failure, renal failure, and overwhelming sepsis. Dr. Hruby opined, "From a clinical standpoint, the infectious etiology of his disease may be related to his deployment to Haiti although deployment occurred months before. The medical literature suggests that these types of unusual infections mainly remain dormant in the gastrointestinal tract for extended periods of time." Dr. Hruby examined appellant on July 3, 2011 and diagnosed necrotizing fasciitis with no clear source, possibly spontaneous, with multisystem organ failure. On July 22, 2011 he diagnosed clostridium perfringens necrotizing fasciitis involving the upper back, right flank, and right anterior abdominal wall.

By decision dated November 1, 2011, OWCP denied appellant's claim on the grounds that the medical evidence did not establish that his diagnosed condition was due to his employment. The Board reviewed his appeal in a decision dated November 5, 2012 and reissued on January 18, 2013² and found that Dr. Hruby did not explain how or why he believed that appellant developed necrotizing fasciitis, and myonecrosis due to his deployment to Haiti. The Board found that appellant had not submitted sufficient medical opinion evidence to establish his occupational disease claim. The facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

Counsel requested reconsideration on August 13, 2013. In a report dated December 1, 2011, Dr. Hruby opined that clostridium perfringens was the etiology of his necrotizing myonecrosis. He stated that clostridium perfringens was endemic in Haiti. Dr. Hruby concluded:

"The patient, after his deployment, developed an acute diarrheal illness followed by fulminant sepsis, and necrotizing myonecrosis. As you are also aware, these infections may lay dormant in carriers for extended periods of time. Based on these criteria, it is probable that this unusual life threatening infection from which [appellant] is recovering may be related to his deployment to Haiti."

² Docket No. 12-1169 (issued November 5, 2012). The Board issued an *Order* reissuing this decision on January 18, 2013 due to nondelivery. See Docket No. 12-1169 (issued January 18, 2013).

By decision dated September 17, 2013, OWCP denied modification of its prior decisions. It reviewed Dr. Hruby's December 1, 2011 report and found that it continued to be speculative as to the relationship between appellant's condition and his employment. The Board reviewed this decision on April 24, 2014³ and found that appellant had not submitted the necessary medical opinion evidence to establish his occupational disease claim.

Counsel requested reconsideration on June 6, 2014 and submitted a brief dated April 24, 2014. In this brief, he argued that OWCP improperly relied on medical journal articles in denying appellant's claim. Counsel described the health situation in Haiti prior to and following the earthquake on January 12, 2010. He opined that appellant was exposed to "an infectious disease laboratory for tropical illnesses." Counsel argued that appellant was hundreds of times more likely to have contracted a severe clostridium infection in Haiti than in the United States. He stated that the record previously lacked the information regarding the epidemiological context of Haiti. Counsel also submitted medical publications regarding Haiti and the Haitian earthquake as well as necrotizing fasciitis and clostridium difficile. He further submitted diagnostic studies from July 2011.

By decision dated August 21, 2014, OWCP declined to reopen appellant's claim for consideration of the merits. It found that the opinion on causal relationship between his diagnosed condition and his employment exposure must be provided by a physician, rather than by counsel. OWCP further found that the medical evidence submitted did not contain any medical opinion evidence.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.⁴ Section 10.606(b) of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.⁵ Section 10.608 of OWCP's regulations provide that when a request for reconsideration is timely, but does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.⁶

ANALYSIS

In support of his request for reconsideration, counsel submitted a brief analyzing the relative health situations in the United States and in Haiti at the time of appellant's visit. He

³ Docket No. 14-203 (issued April 24, 2014).

⁴ 5 U.S.C. §§ 8101-8193, 8128(a).

⁵ 20 C.F.R. § 10.606.

⁶ *Id.* at § 10.608.

opined that appellant was hundreds of times more likely to have developed his infections in Haiti than in the United States. As noted by OWCP, in order to establish appellant's occupational disease claim, he must submit medical opinion evidence that his diagnosed conditions were the result of employment exposures. The opinion of counsel does not constitute medical evidence⁷ and thus is not relevant to the reasons that appellant's claim was denied, the lack of medical reasoning explaining why and how an exposure to conditions in Haiti in January 2010 would result in his diagnosed conditions of necrotizing fasciitis on July 2, 2011. This brief is not relevant and pertinent new evidence. Furthermore, counsel's brief does not offer arguments that show that OWCP erroneously applied or interpreted a specific point of law nor does it advance a relevant legal argument not previously considered by OWCP.

The Board further finds that the medical publications are not relevant to the issue for which resulted in the denial of appellant's claim. These publications are of general application and not determinative regarding whether specific conditions are causally related to particular employment factors in a claim.⁸ These publications were not reviewed by a physician and therefore lack any opinion rendering them specific to appellant's claim. Finally, the medical test results do not contain any mention of the underlying cause of the conditions demonstrated and are not relevant and pertinent new evidence supporting appellant's occupational disease claim.

CONCLUSION

The Board finds that appellant has not met any of the criteria warranting a merit review. OWCP, therefore, properly declined to reopen his claim for consideration of the merits.

⁷ A lay person is not competent to render a medical opinion. See *James A. Long*, 40 ECAB 538 (1989).

⁸ See *P.J.*, Docket No. 14-498 (issued May 19, 2014); and *Gaetan F. Valenza*, 35 ECAB 763 (1984).

ORDER

IT IS HEREBY ORDERED THAT the August 21, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 26, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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