

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

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**J.H., Appellant**

**and**

**DEPARTMENT OF AGRICULTURE,  
OUACHITA NATIONAL FOREST,  
Hot Springs, AR, Employer**

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**Docket No. 17-0826  
Issued: August 22, 2018**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On February 28, 2017 appellant filed a timely appeal from a September 21, 2016 merit decision and a January 19, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish that he developed Lyme disease causally related to his April 15, 2015 tick bite; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On February 11, 2016 appellant, then a 51-year-old sales forester, filed a claim for an occupational disease (Form CA-2) alleging that he developed Lyme disease due to a tick bite sustained while in the performance of duty.<sup>2</sup> He indicated that he first became aware of his condition on April 15, 2015 and first attributed his condition to his employment on February 11, 2016. Appellant noted that he worked in the woods and had many tick bites over the years. He reported, “This tick bite is the first time I have felt bad for a few months.” Appellant noted that he had not received medical confirmation of Lyme disease.

Dr. Amy Reeves, a Board-certified family practitioner, examined appellant on February 15, 2016 due to muscle pain, night sweats, memory loss, and joint aches. She reported a tick bite in the past and requested a Western Blot test for Lyme disease. Dr. Reeves diagnosed malaise and fatigue, as well as joint pain multiple sites.

Appellant’s February 29, 2016 Lyme Immunofluorescence Assay was negative with a titer of less than 40. He also underwent Lyme IgM Western Blot testing, which noted that the test was considered positive if two or more of the double starred bands were present. Appellant’s IgM testing on February 29, 2015 was positive at double starred band 83-93 and less than calibration standard at double starred band 41, which indicated clinical significance and required alternate or repeated testing. He also underwent Lyme IgG Western Blot testing, which would be considered positive if two or more of the double starred bands were present. Appellant was positive at double starred bands 23-25, 34, and 41. He was indeterminate at band 39. Appellant’s multiplex *B. burgdorferi* test was negative for genomic and plasmid *B. burgdorferi*. These tests provided: “Diagnosis should not be based on laboratory tests alone. Results should be interpreted in conjunction with clinical symptoms and patient history.”

On March 23, 2016 Dr. Reeves reviewed appellant’s Lyme testing results and noted +IgG, -IgM and that appellant was positive for several bands. She noted that appellant was prescribed doxycycline with good relief in symptoms and that he worked in forestry and had frequent tick bites due to his work. Dr. Reeves diagnosed joint pain, multiple sites.

In a letter dated April 25, 2016, OWCP requested additional factual and medical evidence in support of appellant’s claim. It afforded him 30 days for a response.

In a note dated May 5, 2016, Dr. Reeves reported that appellant was on the waiting list for evaluation of Lyme disease by another physician. She diagnosed joint pain, multiple sites, and moderate depression. Dr. Reeves completed a report on May 6, 2016 and reviewed appellant’s tick borne illness testing. She found a possible reactivity to Lyme disease based on February 15, 2016 testing and noted that appellant underwent additional testing for Lyme disease on February 29, 2016. Dr. Reeves reported that appellant’s IgG test was positive which suggested an exposure to *B. burgdorferi* (the spirochete responsible for Lyme’s disease). She further noted that appellant tested positive for several bands that are consistent with exposure. Dr. Reeves treated appellant with doxycycline which resulted in good relief of the symptoms. She reported that

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<sup>2</sup> The Board notes that as appellant later attributed his Lyme disease to a specific tick bite on April 15, 2015, this claim was properly developed by OWCP as a traumatic injury claim. *S.S.*, Docket No. 16-0675 (issued July 15, 2016).

appellant had a pending appointment with a Lyme specialist. Dr. Reeves concluded, “Because the patient has had several tick bites related to his employment with the Forestry Department, it is feasible to assume that work-related exposures have contributed to his disease state.”

On May 17, 2016 OWCP again requested additional factual and medical evidence in support of appellant’s claim and afforded him 30 days to respond. The employing establishment responded on May 20, 2016 and concurred with appellant’s allegations that he may have contracted Lyme disease on the job. Appellant’s job duties include walking, standing, stooping, and kneeling in the woods. He was required to be in the woods about once every two to three months for one to two days to conduct “Hot Checks” measuring trees.

Appellant submitted additional factual information on May 23, 2016 and noted on April 15, 2015 he conducted a hot check measuring trees. He discovered several ticks on his clothing and later that evening found a tick attached to the back of his neck in his hair. Appellant had difficulty removing the tick which was firmly attached. This was the only attached tick he remembered removing within the last year. Appellant alleged that he developed flu-like symptoms shortly after April 2015 which recurred every three to four weeks and lasted up to two days. He also experienced tinnitus. Appellant developed pain in his legs in July and by September had developed severe cognitive problems with memory and concentration. His symptoms improved with antibiotics. Appellant asserted that he had no exposure to ticks outside his federal employment and had not had a tick bite that became attached except from employment exposures.

In a July 1, 2016 note, Dr. Jonathan S. Forester, a Board-certified family practitioner, noted that symptoms and description had been sent to OWCP by a previous medical doctor. He found that appellant had a positive IgM Western Blot test and a positive genomic and plasmid *B. burgdorferi* DNA.<sup>3</sup> Dr. Forester opined that, if the serum DNA for Lyme was detected, it was Lyme. He reported appellant’s tick bite on April 15, 2015 and opined that appellant had Lyme disease and was responding to antibiotic treatment.

By decision dated July 15, 2016, OWCP denied appellant’s claim. It accepted that appellant had exposure to ticks while performing his federal job duties noting “There is no question you had exposure to ticks while performing your federal duties in the state of Arkansas.” OWCP also reported, “However, it should be noted from 2012 to the present, the Arkansas Department of Health has reported no ticks in the state of Arkansas carry the Lyme disease.” It further noted that appellant had not provided evidence consisting of “an actual tick from Arkansas with the Lyme disease.” OWCP denied appellant’s claim for failure to establish causal relationship between his diagnosed condition and his employment.

Appellant requested reconsideration of the July 15, 2016 decision on July 26, 2016. He noted that OWCP failed to review Dr. Forester’s July 1, 2016 report.

By decision dated September 21, 2016, OWCP denied modification of its prior decisions. It reviewed Dr. Forester’s July 1, 2016 report and found that he had not explained how a tick bite in Arkansas on April 15, 2015 caused the diagnosed condition. OWCP explained, “It is important

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<sup>3</sup> Dr. Forester did not identify the source of his test findings. The February 29, 2016 testing demonstrated negative genomic and plasmid *B. burgdorferi* rather than the positive findings reported by Dr. Forester.

to note that the Arkansas Department of Health has reported no ticks in the state of Arkansas carry Lyme disease. In addition, the Centers for Disease Control and Prevention website states that in most cases, ‘... the tick must be attached for 36 to 48 hours or more before the Lyme disease bacterium can be transmitted.’” Further, it indicated that the appellant claimed he found a tick on his neck on April 15, 2015 and removed it later that same day.

Appellant requested reconsideration on October 21, 2016. He submitted an October 7, 2016 note from Dr. Forester which noted, “In my expert opinion Lyme does occur in Arkansas, I have treated about 15 patients from Arkansas.” Dr. Forester noted one patient who had contracted Lyme disease on two different occasions at the White River in Arkansas. He reported that appellant received a tick bite on April 15, 2015 and had been diagnosed with Lyme borreliosis through specific tests.

By decision dated January 19, 2017, OWCP denied appellant’s reconsideration request. It found that his reconsideration request neither raised substantive legal questions nor included new and relevant evidence sufficient to warrant further merit review of appellant’s claim.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>4</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty, as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup>

OWCP defines 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 or function of the body affected.”<sup>6</sup> To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether “fact of injury” has been established. First the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time and place, and in the manner alleged.<sup>7</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>8</sup>

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

<sup>6</sup> 20 C.F.R. § 10.5(ee).

<sup>7</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>8</sup> *J.Z.*, 58 ECAB 529 (2007).

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.<sup>9</sup> 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 by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.<sup>10</sup> Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>11</sup>

A medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.<sup>12</sup> Medical rationale includes a physician's detailed opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment activity. The opinion of the physician must be based on a complete factual and medical background of the claim, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and specific employment activity or factors identified by the claimant.<sup>13</sup> The belief of a claimant that a condition was caused or aggravated by the employment is insufficient to establish causal relation.<sup>14</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met his burden of proof to establish that he developed Lyme disease causally related to his April 15, 2015 tick bite.

Appellant, a sales forester, reported that he removed an embedded tick from his neck on April 15, 2015 after performing his job duties evaluating trees in the forest. The employing establishment supported that appellant was exposed to ticks during his work in the forest and OWCP accepted that he was exposed to ticks during the performance of his employment duties.

The Board finds that appellant has not established a causal relationship between his exposure to ticks and his diagnosed Lyme disease. In support of his claim, appellant submitted reports from Dr. Reeves diagnosing malaise and fatigue. Dr. Reeves reviewed appellant's February 29, 2016 positive IgG Lyme test on March 23, 2016 and noted that appellant was positive in several bands. She noted that he worked in forestry and had frequent tick bites due to his employment, but diagnosed joint pain, multiple sites. Dr. Reeves did not diagnose Lyme disease and did not provide any other clear diagnosis. The Board has held that the mere diagnosis of

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<sup>9</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>10</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

<sup>11</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

<sup>12</sup> *T.F.*, 58 ECAB 128 (2006).

<sup>13</sup> *A.D.*, 58 ECAB 149 (2006).

<sup>14</sup> *Lourdes Harris*, 45 ECAB 545, 547 (1994).

“pain” does not constitute the basis for payment of compensation.<sup>15</sup> Without a clear diagnosis, these reports are of limited probative value in establishing appellant’s occupational disease claim.<sup>16</sup>

Appellant also submitted medical evidence from Dr. Forester diagnosing Lyme disease on the basis of test results. Dr. Forester noted appellant’s tick bite on April 15, 2015 and opined that appellant had Lyme disease as a result of this tick bite and was responding to antibiotic treatment. A mere conclusion without the necessary rationale explaining how and why Dr. Forester believes that appellant’s tick bite resulted in Lyme disease is insufficient to meet appellant’s burden of proof.<sup>17</sup> Dr. Forester did not provide the specific test results that he relied upon or otherwise detail the basis for his conclusions.<sup>18</sup> The Board finds that appellant has not submitted the necessary rationalized medical opinion evidence to establish that he developed Lyme disease due to exposure to a tick bite while performing his federal job duties.

### **LEGAL PRECEDENT -- ISSUE 2**

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.<sup>19</sup> Section 10.606(b)(3) of the Code of Federal Regulations provides 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.<sup>20</sup> Section 10.608 of OWCP’s regulations provides that when a request for reconsideration is timely, but does not 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.<sup>21</sup> Section 10.607(a) of OWCP’s regulations provides that to be considered timely an application for reconsideration must be received by OWCP within one year of the date of OWCP’s merit decision for which review is sought.<sup>22</sup>

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<sup>15</sup> *Robert Broome*, 55 ECAB 339 (2004).

<sup>16</sup> *D.L.*, Docket No. 16-0528 (issued August 24, 2016).

<sup>17</sup> *B.S.*, Docket No. 16-1122 (issued October 17, 2016).

<sup>18</sup> The Board notes that OWCP procured evidence from the internet in effort to support its denial of appellant’s claim. This effort is contrary to the remedial nature of FECA which requires that claims be expeditiously resolved consistent with full protection of the rights of the parties. The Board finds that OWCP’s claims examiner has failed to act in a fair and impartial manner by conducting her own investigation into medical issues without consulting a second opinion physician or OWCP medical adviser. *Eunice M. James*; 52 ECAB 197 (2001); *Arlonia B. Taylor*, 44 ECAB 591 (1993).

<sup>19</sup> 5 U.S.C. § 8128(a).

<sup>20</sup> 20 C.F.R. § 10.606(b)(3).

<sup>21</sup> *Id.* at § 10.608.

<sup>22</sup> *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

## **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant's October 21, 2016 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. The Board also finds that it did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>23</sup>

In support of his request for reconsideration, appellant submitted Dr. Forester's October 7, 2016 note. Dr. Forester indicated that appellant's diagnosis of Lyme disease was based on specific tests and the April 15, 2015 tick bite. He also noted that Lyme disease had previously been diagnosed in Arkansas. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record<sup>24</sup> does not constitute a basis for reopening a case. The Board finds that Dr. Forester's October 7, 2016 note is cumulative of his July 1, 2016 report previously reviewed as it repeats the findings and conclusions. Therefore, this report is insufficient to require OWCP to reopen the claim for consideration of the merits as it does not constitute relevant and pertinent new evidence not previously considered by OWCP regarding the underlying issue of causal relationship.

The Board finds that, as appellant did not satisfy any of the three requirements under section 10.606(b)(3) to warrant further merit review of his claim, OWCP properly denied his request for reconsideration.

## **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish that he developed Lyme disease causally related to his April 15, 2015 tick bite. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>23</sup> See *J.R.*, Docket No. 17-0346 (issued July 24, 2018).

<sup>24</sup> *A.D.*, Docket No. 18-0497 (issued July 25, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 19, 2017 and September 21, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.<sup>25</sup>

Issued: August 22, 2018  
Washington, DC

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

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

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<sup>25</sup> Colleen Duffy Kiko, Judge, participated in this decision, but was no longer a member of the Board effective December 11, 2017.