

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

M.S., Appellant)

and)

DEPARTMENT OF THE ARMY, FORWARD)
OPERATING BASE HAMMER, Iraq, Employer)

**Docket No. 17-0980
Issued: June 19, 2018**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

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

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 4, 2017 appellant, through counsel, filed a timely appeal from a January 30, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met his burden of proof to establish that his diagnosed amyotrophic lateral sclerosis (ALS)/motor neuron disease (MND) was causally related to his accepted employment exposure.

FACTUAL HISTORY

On May 14, 2015 appellant, then a 59-year-old human terrain analyst, filed an occupational disease claim (Form CA-2) for a neurological condition ALS/MND, which he attributed to his work exposure while stationed in Iraq. He indicated that he had been exposed to tons of hazardous chemicals, weapons of mass destruction (WMD), explosives, improvised explosive devices (IED), vehicle-borne improvised explosive devices (VBIED), sand/dust storms, and Army fire pits. Appellant first became aware of his condition on March 1, 2010, and first realized it was employment related on April 27, 2015.

In a May 19, 2015 development letter, OWCP acknowledged receipt of appellant's claim, but noted that it had not received any other documentation with his claim form. It advised appellant of the need for medical evidence in support of his claim. OWCP also provided appellant a factual questionnaire to complete and return. It specifically inquired about the details of appellant's employment-related exposure. Additionally, OWCP inquired about the delay in filing the claim, given that appellant reported having been aware of his condition in March 2010. It afforded him 30 days to submit the requested medical evidence and factual information.

In a June 16, 2015 statement, appellant explained that he began to work for the employing establishment on October 16, 2009 and was deployed to Iraq from November 2009 to June 2011 as an intelligence specialist where he traveled to various U.S. Army posts in Iraq. He related that during this period he was exposed to open U.S. Army fire pits, agricultural farm pesticides, sand/dust storms that were full of chemicals, war debris, particles, biological weapons such as anthrax, chemical weapons such as sarin and nerve gas, other chemical agents, live vaccines such as polio and yellow fever, and depleted uranium. Appellant alleged that all of the above caused or accelerated his health problems. He related that after four months of being deployed in Iraq, around March 2010, he noticed severe headaches, high blood pressure, allergies, skin irritation, body, muscles, joints and nerve pain, numbness in his legs and left arm, and memory loss. Appellant described a specific incident in December 2010 when a large VBIED exploded within yards of him. He reported that, after a long investigation, his neurologist and internist informed him in 2015 that he suffered from ALS/MND, muscle weakness in his arms and legs, and ongoing pain in his neck and lower back, and persistent headaches.

OWCP received a field report about a Combined Medical Engagement (CME) mission that occurred on December 12, 2010 in Al Waleed, Iraq when a VBIED detonated at a nearby school. The report mentioned appellant having attended the event.

On June 22, 2015 OWCP received several diagnostic reports. An August 21, 2014 cervical spine x-ray showed moderate multilevel degenerative changes. A February 11, 2015 electromyography (EMG) and nerve conduction velocity (NCV) study revealed evidence of active denervation in some of appellant's left lower extremity muscles and evidence of chronic

denervation in many muscles of the upper and lower extremities. A June 10, 2015 brain magnetic resonance imaging (MRI) scan showed volume loss advanced for age with minimal subcortical disease.

In reports dated October 28, 2014 to May 19, 2015, Dr. Herbert Lubowitz, a Board-certified internist, indicated that appellant's complaints centered on pain and weakness in his extremities, difficulty swallowing, and muscular movements in his legs, which may be fasciculation. He related that appellant believed some of his abnormalities might be related to toxic exposure while he worked for the Department of Defense five years ago in Iraq. Upon neurological examination, Dr. Lubowitz reported increased fall risk with poor balance and some weakness in hand grips. He reported that appellant had a very complex neurologic problem, which appeared to look more and more like ALS or a similar motor neuron disease.

Dr. Lubowitz indicated in a June 15, 2015 narrative report that he had treated appellant for the past year for various symptoms. He related that appellant developed a severe and debilitating neuromuscular problem which had been progressing such that he continued to lose weight, had symptoms of dysphonia and dysphagia, and experienced fasciculation about eight weeks ago. Dr. Lubowitz indicated that diagnostic testing showed abnormalities. He opined that appellant's symptoms seemed to reflect ALS or a similar neurological problem. Dr. Lubowitz related that appellant felt his neurological symptoms were related to exposure to various toxins during his service in Iraq.

In May 22 and June 17, 2015 reports, Dr. Ksenija Kos, a Board-certified neurologist, related that appellant complained of diffuse, neurogenic pains, diffuse muscle weakness and atrophy, and difficulty swallowing. Upon neurological examination, he observed 4/5 motor strength in the left upper extremity proximally and distally and decreased lower extremity strength proximally bilaterally. Dr. Kos also reported decreased sensation to pinprick in the median nerve distributions bilaterally and over the feet bilaterally. He reported that appellant had slowly progressive diffuse muscle weakness and atrophy with fasciculation. Dr. Kos indicated that in view of appellant's neurogenic muscle biopsy and negative NCV study for a motor peripheral neuropathy, he was concerned about ALS/MND.

By decision dated July 21, 2015, OWCP denied appellant's occupational disease claim because it was not timely filed within three years of the date of injury. It explained that appellant reported a date of injury of March 1, 2010, but he did not file his occupational disease claim until May 14, 2015.

On August 14, 2015 appellant, through counsel, requested a telephone hearing before a hearing representative from OWCP's Branch of Hearings and Review.

In a July 29, 2015 attending physician's report (Form CA-20), Dr. Lubowitz noted a date of injury of March 1, 2010. He described a history of neck injury, muscle, nerve, and joint pain, numbness, weakness, and diabetes. Dr. Lubowitz indicated that appellant had preexisting cervical radiculitis. He diagnosed ALS or similar MND, diabetes, and arthritis. In response to the question regarding whether appellant's condition was caused or aggravated by an employment activity, Dr. Lubowitz reported: "unknown."

By decision dated February 4, 2016, an OWCP hearing representative set aside the July 21, 2015 denial decision. She found that appellant had timely filed his occupational disease claim within three years of April 27, 2015, the date that he first became aware that his condition resulted from his federal employment. The hearing representative remanded appellant's case for OWCP to further develop appellant's claim, make appropriate findings of fact, and issue a *de novo* decision.

By letter dated February 24, 2016, OWCP requested additional evidence from the employing establishment regarding appellant's tour of duty (TDY) in Iraq from November 2009 to June 2011.

On March 15, 2016 OWCP received the employing establishment's response to its development letter. It explained that it could not provide additional information regarding appellant's TDY because his supervisor had retired and was unreachable. The employing establishment also reported that the Training and Doctrine Command, Intelligence Support Element (TRISA) no longer existed. OWCP received a position description for an intelligence specialist.

By decision dated March 28, 2016, OWCP denied appellant's occupational disease claim. It accepted that appellant sustained work-related exposure while in Iraq and had a diagnosis of ALS/MND, but denied his claim because the medical evidence submitted was insufficient to establish that his ALS/MND condition was causally related to his federal employment exposure.

On April 5, 2016 appellant, through counsel, requested a telephone hearing before a representative from OWCP's Branch of Hearings and Review. On November 14, 2016 a telephone hearing was held. Appellant was represented by counsel.

OWCP received a print-out of an article from the ALS Association titled "ALS Risk Appears Increased in Veterans: New Government Report Agrees." It also received an article titled "Amyotrophic Lateral Sclerosis among 1991 Gulf War Veterans: Evidence for a Time-Limited Outbreak."

By decision dated January 30, 2017, an OWCP hearing representative affirmed the March 28, 2016 denial decision. She found that the medical evidence of record was insufficient to establish a causal relationship between appellant's ALS/MND and exposure to chemicals during his federal employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence⁴ including that he or she sustained an injury in the performance of duty, and that any

³ *Id.*

⁴ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁵

In an occupational disease claim, appellant's burden requires submission of the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁶

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁷ The opinion of the physician must be based on a complete factual and medical background of the employee, 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.⁸

ANALYSIS

Appellant alleged that he developed ALS/MND as a result of exposure to tons of hazardous chemicals, WMD, explosives, IED, VBIED, sand/dust storms, and Army fire pits. OWCP accepted appellant's reported occupational exposure, as well as a medical diagnosis. However, it denied the claim because the medical evidence submitted failed to establish a causal relationship between appellant's diagnosed ALS/MND and the accepted employment exposure. The Board finds that appellant has not met his burden of proof to establish causal relationship.

In reports dated October 28, 2014 to June 15, 2015, Dr. Lubowitz reviewed appellant's history and provided neurological examination findings. He reported that appellant had a very complex neurologic problem that reflected ALS or a similar neurological problem. Dr. Lubowitz related that appellant believed that his abnormalities were related to toxic exposure while he worked for the employing establishment five years ago in Iraq. In a July 29, 2015 Form CA-20, Dr. Lubowitz diagnosed ALS or similar MND. In response to the question regarding whether appellant's condition was caused or aggravated by an employment activity, Dr. Lubowitz reported: "unknown." The Board notes that Dr. Lubowitz discussed appellant's toxic work exposure and provided a diagnosed condition based on examination findings. Dr. Lubowitz did not, however, provide an affirmative opinion relating appellant's diagnosed neurological condition to his workplace exposure. On the contrary, he specifically responded "unknown" regarding the cause

⁵ *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

⁷ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

⁸ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

of appellant's condition.⁹ The Board finds that his reports are insufficient to establish appellant's occupational disease claim.

Appellant was also treated by Dr. Kos. In May 22 and June 17, 2015 reports, Dr. Kos noted appellant's complaints of neurologic pains and muscle weakness. He provided examination findings and indicated that he was concerned about ALS/MND. Dr. Kos, however, did not provide any opinion regarding the cause of appellant's ALS/MND. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁰ For this reason, these reports are insufficient to establish appellant's claim.

The remaining diagnostic reports, including the August 21, 2014 cervical spine x-ray report, February 17, 2015 EMG/NCV study report, and June 11, 2015 brain MRI scan report, are of limited probative value as diagnostic reports fail to provide an opinion on the causal relationship between appellant's workplace exposure and his diagnosed condition(s). For this reason, this evidence is insufficient to meet his burden of proof.¹¹

The evidence of record also contains submitted medical journal articles discussing ALS/MND after working in the Middle East.¹² None of the reports, however, contained an opinion or explanation that appellant's ALS/MND resulted from his federal work exposure in Iraq.¹³

On appeal counsel alleges that the January 30, 2017 decision is contrary to fact and law. He has not, however, provided evidence to support his argument. Causal relationship is a medical question that must be established by probative medical opinion from a physician.¹⁴ The mere fact that work activities may produce symptoms revelatory of an underlying condition does not raise an inference of an employment relation. Such a relationship must be shown by rationalized medical evidence of a causal relation based upon a specific and accurate history of employment conditions which are alleged to have caused or exacerbated a disabling condition.¹⁵ As appellant

⁹ The fact that the etiology of a disease or condition is unknown or obscure does not relieve an employee of the burden of establishing a causal relationship by the weight of the medical evidence nor does it shift the burden of proof to OWCP to disprove an employment relationship. *Judith J. Montage*, 48 ECAB 292, 294-95 (1997).

¹⁰ *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

¹¹ *See A.B.*, Docket No. 17-0301 (issued May 19, 2017).

¹² The medical articles referenced a relationship between an increased risk of ALS in Gulf War veterans.

¹³ *William C. Bush*, 40 ECAB 1064, 1075 (1989) (medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship between a claimed condition and employment factors because such materials are of general application and are not determinative of whether the specifically claimed condition is related to the particular employment factors alleged by the employee).

¹⁴ *W.W.*, Docket No. 09-1619 (issued June 2010); *David Apgar*, 57 ECAB 137 (2005).

¹⁵ *Patricia J. Bolleter*, 40 ECAB 373 (1988).

has not provided such rationalized medical evidence showing that his accepted work exposure caused or aggravated his ALS/MND, he has not met his burden of proof to establish his claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish ALS/MND causally related to his accepted employment exposure.

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 19, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board