

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMY A. HAMMONS and PEACE CORPS,
WORKERS COMPENSATION MANAGER,
Washington, DC

*Docket No. 98-1259; Submitted on the Record;
Issued December 8, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained a broken tooth number 20, causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for a review of the written record.

Appellant, a 50-year-old, served as a Peace Corps volunteer in Poland from January 1995 to January 1997 and upon his return filed a claim for repair of dental deterioration which had occurred while on his tour. He claimed that "it started with a toothache" after which, following Polish evaluation and treatment of an abscess, he was directed by the employing establishment medical officer to have it repaired after he returned to the United States. Appellant also claimed that, shortly before leaving Poland, a filling and part of a tooth broke off while eating, which also needed to be repaired. However, he did not identify which tooth was involved.

Upon appellant's return to the United States, he sought dental treatment with Dr. Jay Joseph, a dentist, who submitted a treatment plan worksheet which included porcelain crowns for teeth numbers 14, 18, 20, 29, 30 and 32 and a porcelain bridge for teeth numbers 19 and 31. An attending dentist's statement reported the same planned procedures. On a dental health record Dr. Joseph diagramed the extraction at tooth number 31, the bridge from teeth 30 to 32 and a bridge from tooth 18 to 20. On the reverse of the form, Dr. Joseph indicated that he charted the work needed, but that the bridges were not done and he reiterated that appellant needed crowns at numbers 14 and 29, an extraction at number 31 due to abscess, a bridge from number 18 to 20 and a bridge from number 30 to 32.

Appellant submitted 1995 preemployment predeparture employing establishment medical and dental records diagrams which indicated that preemployment predeparture tooth number 20 had fillings but was intact. Polish dental examination reports from 1996 also indicated that

tooth number 20 was intact. Appellant also submitted dental x-rays from 1994 and from February 1997 for comparison.

The record was referred to an Office dental consultant, Dr. David H. Spiegelman, who opined on March 20, 1997 that tooth 31 was abscessed and needed extraction and a bridge was needed from 29 to 32 and teeth 14, 29 and 32 also needed full crowns. However, Dr. Spiegelman indicated that tooth number 19 was missing at induction so that the bridge from 18 to 20 was not approved. The appropriateness of the recommended crowns at 18 and 20 was not addressed. Dr. Spiegelman further did not address whether he examined and compared appellant's 1994 dental x-rays and his February 1997 post-service x-rays to ascertain if any traumatic changes in dentition had occurred during employing establishment service.

Extraction of the abscessed tooth number 31 was accepted, as was a bridge from tooth number 29 to 32 and crowns on teeth numbers 14, 29 and 32. Concurrent conditions not due to employment were noted to include a missing tooth at number 19.¹ The recommended crowns for teeth number 18 and 20 were not addressed.

By letter dated April 7, 1997, the Office notified appellant of the accepted dental repairs and treatment and advised that the evidence of record was insufficient to establish that the employing establishment service caused his tooth 19 condition or teeth 18 through 20 bridge problems. The letter did not address the recommended crowns at teeth 18 and 20. The Office did note, however, as follows:

“Under the [Federal Employees’ Compensation Act] as such relates to Peace Corps volunteers, dental problems are considered contracted abroad if comparison with preinduction dental examination shows a new dental condition or service-related deterioration of a prepeace corps service dental condition. If medical evidence shows a new dental condition then it will be accepted. However, if there is medical evidence of deterioration of a preexisting dental problem further development is required.”²

By letter dated July 7, 1997, appellant advised the employing establishment that he still needed a crown for tooth number 20.

By letter to the employing establishment dated September 12, 1997, appellant again claimed that he needed a crown for tooth number 20. Appellant explained that this tooth was damaged shortly before he left Poland while he was eating, with the filling coming out and part of the tooth breaking off. He stated that the bridge recommended by Dr. Joseph would have corrected the broken tooth number 20, but that since the bridge was rejected, he still needed a crown at tooth 20. Appellant admitted that the tooth 18 to 20 bridge was properly rejected as tooth 19 was missing before his employing establishment service.

¹ The Office also erroneously noted “bridge number 18 [to] 20” as a concurrent condition not due to employment. The Board notes that this is not a condition but was a rejected prosthesis request.

² See 5 U.S.C. § 8142 (c)(3); 20 C.F.R. § 10.605(a).

By decision dated November 20, 1997, the Office denied any further dental treatment related to teeth number 18, 19 and 20.

By letter dated December 18, 1997, which was received by the Office on December 23, 1997,³ appellant requested a review of the written record, contending that he needed a crown for tooth number 20 which was damaged while he was in Poland.

By decision dated February 12, 1998, the Office rejected appellant's request for a review of the written record finding that it was untimely requested and that he could request reconsideration and submit evidence not previously considered. The Office claimed that appellant's request was "postmarked" December 23, 1997, the date it was stamped received by the Office.

Appellant appealed to the Board by letter postmarked March 3, 1998, which took jurisdiction that date.

On March 16, 1998 the Office also received a March 3, 1998 reconsideration request from appellant.

By decision dated April 16, 1998, the Office rejected appellant's request for a further review of the case on its merits. As the Board had already taken jurisdiction of this case, this decision by the Office is null and void for lack of jurisdiction.⁴

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

In this case, the Board finds that the Office applied the incorrect implementing regulations when assessing the evidence of record. Moreover, the Office dental adviser did not address the appropriateness of a tooth 20 crown for appellant's alleged broken tooth, nor did he review all the evidence of record, particularly the pre- and post-service dental x-rays, to determine whether in fact appellant had a broken number 20 tooth in 1997 which was not there in 1994.

Section 10.605(a) of the Act's implementing regulations states:

"Any injury suffered by a volunteer during any time when the volunteer is located abroad *shall be presumed* to have been sustained in the performance of duty and any disease or illness contracted during such time shall be presumed to be proximately caused by the employment,*(emphasis added)* except the presumption will be rebutted by evidence that:

* * *

³ The envelope bearing the postmark was not retained in the case record.

⁴ See *Douglas E. Billings*, 41 ECAB 880 (1990).

(2) The disease or illness is shown to have preexisted the period or service abroad; or

“(3) The disease or illness or condition claimed is either a manifestation or symptoms of or consequence to a preexisting congenital defect or abnormality.”

As appellant’s tooth 20 appears intact as noted in his 1995 predeparture employing establishment physical examination dental diagram, but is alleged to have been broken and in need of a crown when he returned in 1997, there arises a rebuttable presumption that the condition claimed was sustained in the performance of duty. Dr. Spiegelman did not review or address the 1994 and 1997 dental x-rays which are of record and which would establish whether the claimed condition occurred in the service interim. The medical evidence appellant submitted does state that tooth number 20 is in need of a crown, but it does not state whether this crown is needed to correct damage to the tooth or merely to establish a firm anchor for the proposed bridge which was properly rejected by the Office.

Proceedings under the Act are not adversarial nature, nor is the Office a disinterested arbiter. The Office shares responsibility in the development of the evidence to see that justice is done.⁵ In the instant case, although appellant’s treating dentist’s records do not contain information sufficient to conclusively establish that damage to tooth number 20 occurred, it constitutes substantial, uncontradicted evidence in support of appellant’s claim and raises an uncontroverted inference sufficient to require further development of the case record by the Office.⁶

Therefore, the case will be remanded to the Office for referral of appellant, together with his preemployment dental x-rays and his post-employment dental x-rays and the complete case record, with specific questions to be answered, to an appropriate specialist for a determination as to whether appellant broke tooth number 20 while he was in Poland in employing establishment service, such that it would be presumed to be sustained in the performance of duty in accordance with 20 C.F.R. § 10.605(a) and requires a crown for repair with this disposition of the first issue, the second issue becomes moot.

⁵ *William J. Cantrell*, 34 ECAB 1223 (1983).

⁶ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

Consequently, the decisions of the Office of Workers' Compensation Programs dated February 12, 1998 and November 20, 1997 are hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, D.C.
December 8, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member