

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL J. DUFFY and DEPARTMENT OF AGRICULTURE,
ANIMAL & PLANT HEALTH INSPECTION SERVICE, Albuquerque, NM

*Docket No. 98-1686; Submitted on the Record;
Issued February 22, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained an injury on or about September 29, 1995 causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to section 8124 of the Federal Employees' Compensation Act.

On December 11, 1995 appellant, then a 52-year-old veterinary medical officer, filed an occupational disease claim alleging that he sustained a skin problem due to exposure to an infectious disease of which he first became aware September 29, 1995 and realized was causally related to factors of his federal employment on November 28, 1995. In a supplemental statement, appellant indicated that he was on a 30-day detail to New Mexico. He reported that he was exposed to unknown etiological agents while handling samples to determine whether the vesicular stomatitis virus was present. Appellant indicated that he did not wear gloves because the virus had a very low rate of infection to humans. He was last exposed to this agent September 28, 1995. In a decision dated May 2, 1996, the Office denied appellant's claim on the grounds that the claimed condition did not occur within the performance of duty. By decision dated September 5, 1997, an Office hearing representative remanded this case for further development of the evidence regarding a causal relationship between the claimed condition and factors of appellant's federal employment. In a decision dated January 12, 1998, the Office denied appellant's claim on the grounds that the evidence did not establish that the claimed condition was causally related to his federal employment. By decision dated April 6, 1998, the Office denied appellant's request for a hearing.

The Board has duly reviewed the entire case record on appeal and finds that appellant has not established that he sustained an injury was causally related to factors of his federal employment.

An award of compensation may not be based on surmise, conjecture, speculation, or appellant's belief of causal relationship.¹ The Board has held that the mere fact that a disease or condition manifests itself during a period of employment does not raise an inference of causal relationship between the condition and the employment.² Neither the fact that the condition became apparent during a period of employment nor appellant's belief that employment caused or aggravated his condition is sufficient to establish causal relationship.³ While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty,⁴ neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.⁵

In the present case, appellant indicated that his claimed condition began on his left leg and that he believed this skin condition was causally related to exposure to an unknown agent. He submitted medical reports by Dr. P. Samuel Pegram, a professor at the Bowman Gray Medical School and specialist in infectious disease, who diagnosed cryoglobulinemia and small vessel vasculitis which "most likely" was infectious. In a note dated June 25, 1997, he indicated appellant "most likely" experienced a viral infection causing his symptoms/sign complex in September 1995. Dr. Pegram also noted that most viral agents have an incubation period of 30 days which suggested appellant acquired his condition within the prior 30 days. However, appellant also submitted a report dated October 26, 1995 by Dr. Joseph L. Jirizzo, the Chair of the Dermatology Department at Bowman Gray Medical School, who diagnosed small vessel vasculitis, etiology unknown. Dr. Jirizzo reported possible sources of this condition which included infection given appellant's recent exposure to infected stomatitis, medication, connective tissue disease, inflammatory bowel cancer, myeloproliferative disease or idiopathic. The evidence presented by appellant from Dr. Pegram is speculative in nature as he said it was "most likely" due to a virus.⁶ Dr. Pegram did not provide an explanation of the cause of appellant's claimed condition or how it was caused or contributed to by appellant's federal employment. Similarly, the report by Dr. Jirizzo listed numerous possible causes for appellant's condition and does not definitively relate his claimed condition to factors of his federal employment. The Office referred appellant to Dr. Joseph W. Shands, Jr., an internist specializing in infectious diseases. He diagnosed vasculitis due to a mixed cryoglobulinemia, abnormal liver function of unknown etiology, mild anemia and thrombocytopenia. Dr. Shands noted most cases of cryoglobulinemia are idiopathic or caused by Hepatitis C and that it may be

¹ *Williams Nimitz, Jr.*, 30 ECAB 567, 570 (1979); *Miriam L. Jackson Gholikely*, 5 ECAB 537, 538-39 (1953).

² *Edward E. Olson*, 35 ECAB 1099, 1103 (1984).

³ *Joseph T. Gulla*, 36 ECAB 516, 519 (1985).

⁴ *See Kenneth J. Deerman*, 34 ECAB 641 (1983).

⁵ *See Margaret A. Donnelly*, 15 ECAB 40 (1963); *Morris Scanlon*, 11 ECAB 384 (1960).

⁶ *Charles A. Massenzo*, 30 ECAB 844 (1978).

associated with auto-immune disease with malignancies. Dr. Shands found that the likelihood of the claimed condition being related to appellant's employment was small to negligible and that the reports reviewed did not contain any record of any antibody triggers suggesting infection by the vesicular stomatitis virus. The report of Dr. Shands does not support that appellant's condition was causally related to the factor identified by appellant, the vesicular stomatitis virus. As appellant has not established that his claimed condition was related to this factor of his federal employment, he has not met his burden of proof.

The Board also finds that the Office properly denied appellant's request for hearing.

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁷ As section 8124(b)(1) is unequivocal in setting forth the time limitations for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁸

In this case, the Office issued its last merit decision on January 12, 1998. Appellant requested a hearing by letter postmarked February 17, 1998. Since appellant's request for a hearing was not within 30 days of the Office's decision, his request was untimely pursuant to section 8124(b)(1) of the Act and he was not entitled to a hearing as a matter of right.

Nonetheless, even when the hearing request is not timely, the Office has the discretion to grant the hearing request and must exercise that discretion. In this case, the Office advised appellant that it considered his request in relation to the issue involved, and the hearing was denied on the basis that he could address this issue by submitting evidence which showed that his claimed condition was causally related to factors of his federal employment. Appellant was advised that he may request reconsideration with additional evidence. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.⁹ There is no evidence of an abuse of discretion in the denial of a hearing in this case.

⁷ 5 U.S.C. § 8124(b)(1).

⁸ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

⁹ *Daniel J. Perea*, 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Programs dated April 6 and January 12, 1998 are hereby affirmed.

Dated, Washington, D.C.
February 22, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member