U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL D. PAULSEN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Battle Creek, MI,

Docket No. 02-1606; Submitted on the Record;
Issued May 14, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has established that his neuropathy condition is causally related to his accepted employment-related injury of pesticide exposure.

On September 29, 1988 appellant, then a 47-year-old horticulturist, filed a notice of occupational disease (Form CA-2), alleging that his pesticide toxicity was employment related.[1] The Office accepted appellant's exposures and pesticide toxicity.[2] The claim was further developed on the nature of appellant's neuropathy condition and extent of disability.

In an April 12, 1988 initial visit by Dr. Paula G. Davey, an attending Board-certified internist, based upon a physical examination and medical history diagnosed appellant as "Apparently chemically sensitive due to prolonged pesticide exposure" in his employment.

In a July 22, 1988 report, Dr. Davey diagnosed sensory neuropathy and multiple chemical and inhalant sensitivities, which she attributed to his pesticide exposure as a horticulturist. Dr. Davey attached her report of appellant's initial visit of April 12, 1988.

Dr. Davey, in an August 11, 1988 report, diagnosed fatigue, candidacies, mitral valve prolapse, cerebral dysfunction, sensory neuropathy and multiple chemical inhalant and food sensitivities due to pesticide exposure in his employment. Test results "revealed elevated levels of PBBs, PCBs, chlordane and hexochlorobenzene, the later two are organ chlorine pesticides."

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[1] This was assigned claim number A9-325409. The record contains evidence of an earlier traumatic claim filed by appellant on May 16, 1988 alleging an injury on May 13, 1988. This was assigned claim number A9-322328 and was denied by the Office of Workers' Compensation Programs on August 17, 1988. Appellant noted that he had two prior claims, which were approved. Claim number A9-250634 was accepted for chronic strain left knee and back and claim number A9-262669 was accepted for chronic cough.

[2] Appellant stopped work on July 6, 1988.

In support of her conclusion that appellant's condition was employment related, Dr. Davey noted:

> "[Appellant] has been exposed to highly toxic chemicals for prolonged period[s] of time without adequate safety precautions. Exposure to these chemicals has elicited major multi-system symptoms."

The Office medical adviser reviewed Dr. Davey's reports and recommended referral for a second opinion.

In a March 28, 1989 report, Dr. Thomas J. Petz, a second opinion Board-certified internist and pulmonary specialist, diagnosed mitral valve prolapse, carotenemia and inactive graumlomatous disease of the lung. He opined that appellant had "innumerable subjective complaints without discernible objective evidence other than outlined in my diagnoses." Dr. Petz noted "no objective evidence of disease is found that would be considered disabling." In an April 19, 1988 work restriction evaluation, he opined that appellant was capable of working eight hours a day as there was no objective evidence of any disability.

In a June 22, 1989 report, Dr. Davey opined that appellant was totally disabled as appellant's weakened immune system made him more sensitized and susceptible to infection. She diagnosed multiple medical conditions, including multiple chemical, food and inhalant sensitivities with pesticide toxicity secondary to pesticide exposure in his employment. In support of her findings, Dr. Davey related test results, which revealed:

> "An adipose tissue survey revealed elevated levels of PBBs, PCBs, chlordane and hexochhlorobenzene, the latter two are organochlorine pesticides. Protein electrophoresis revealed oligoclonal banding of immunoglobulins which suggests possible immune system dysfunction. LDH and cholesterol were high with a low serum RBC and high cholinesterase…. Results of the anti-Candida titre indicate moderately high IgM in bloodstream and relatively low IgC, which suggests a poor immune response…. These results are indicative of pesticide poisoning with carbonates and organophosphates."

On June 29, 1989 appellant filed a claim for compensation for lost wages beginning approximately September 1989, when all pay stopped.

In an August 3 and 22, 1989 report, Dr. Davey opined that appellant's current condition was due to his pesticide exposure at work. In support of this opinion, the physician noted that appellant had a prolonged exposure to the pesticide chemicals, which are highly toxic without adequate protection.

In a supplemental report dated September 20, 1989, Dr. Petz found that there was "no evidence of any active disease." He noted that appellant's clinical chest examination and both the x-ray interpretation and pulmonary function tests were also normal. Regarding neurological impairment, Dr. Petz concluded that it was also normal and that appellant's complaints were subjective, as there were no "objective abnormalities to confirm the presence of disease."

In a November 16, 1989 report, Dr. Davey reviewed Dr. Petz's reports. She opined that appellant "developed generalized sensory peripheral neuropathy" due to his employment and exposure to pesticides. Dr. Davey reiterated her opinion regarding appellant's disability noting: "The levels of organocholorine pesticides and PBB and PCBs in his adipose tissue remain at toxic levels."

The Office found a conflict of medical opinion between Dr. Davey and Dr. Petz. On November 20, 1989 the Office referred appellant to Dr. Steven B. Rubin, a Board-certified internist with a subspecialty in geriatric medicine and pulmonary disease, to resolve the conflict in the medical opinion as to whether appellant's condition was due to his accepted pesticide toxicity. The record reflects that Dr. Rubin referred appellant for neurological and occupational health consultations.

In a December 26, 1989 report to Dr. Rubin, Dr. Stuart N. Kieran, a Board-certified neurologist, reviewed appellant's history of pesticide exposure and concluded that there was objective evidence to support a diagnosis of peripheral nerve dysfunction. Regarding the cause of the condition, Dr. Kieran concluded that "Pesticide exposure and/or other insecticide materials other than organophosphates may be causing his peripheral neuropathy." He stated that he needed to review additional records to determine if other chemical exposures might "be implicated in his neurological symptoms."

In a March 19, 1990 report to Dr. Rubin, Dr. Al Franzblau, Board-certified in internal and occupational medicine, and Dr. Victoria Anne Cassano, Board-certified in occupational medicine, noted that appellant was referred to the University of Michigan's Occupational Health Clinic for consultation. The physicians diagnosed severe peripheral neuropathy based upon history and physical examination. As to the cause of appellant's condition, the physicians stated that "The etiology of these neurological problems cannot be elucidated without further evaluation by neurology, neurophysiology and possibly neurophysiology" and review of the entire medical record. In turn appellant was referred by Dr. Franzblau to Dr. James W. Albers, a Board-certified neurologist at the University of Michigan, for neurological evaluation. In a report dated May 18, 1990, Dr. Albers diagnosed primary sensory neuropathy. Regarding the cause of appellant's condition, he noted:

> "[Dr. Franzblau's] findings are consistent with those seen in 'ataxic polyneuropathy' syndrome. A variety of etiologies have been associated with this disorder, including dysimmune sensory ganglionitis, carcinomatous and paraneoplastic disorders, toxic (examples pyridoxine, cis-platinum, vacor poisoning), Sjorgen's disease and other connective tissue disorders, familial sensory neuropathy, Friedreich's ataxia and idiopathic ganglionitis. At this time given the duration of [appellant]'s symptoms and lack of a definite family history, an apparent neoplastic disorder or a familial disorder, seems very, very unlikely. Sjogren's syndrome can be associated with this, however, his lack of dry eyes and dry mouth go against this. It is possible that one of the toxins he was exposed to at work could be contributing to his symptoms. Finally, it is possible that this is an idiopathic disorder for which we will find no reason."

Dr. Albers noted that more research was required regarding appellant's exposure to the chemicals at his employment and that he would see appellant again in one month's time.

In a July 1, 1990 report, Drs. Franzblau and Cassano stated that they had reviewed appellant's medical records and diagnostic studies. They noted appellant's evaluation by Dr. Albers and the diagnosis of ataxic neuropathy syndrome. Drs. Franzblau and Cassano reviewed appellant's blood chemistry and a fat biopsy to test for xenobotic toxins. They diagnosed severe neuropathy, which was totally disabling. The cause of appellant's disability was not yet established. The physicians stated: "There is, however, no evidence that this disease was caused by any chemicals that [appellant] may have been exposed to in the workplace."

By decision dated August 7, 1991, the Office denied compensation benefits for disability on the basis that the evidence was insufficient to establish that his disability was causally related to his employment pesticide exposure. The Office found that the weight of the evidence rested with Dr. Franzblau, who concluded that the cause of appellant's disability was unknown.

Appellant requested a hearing in a letter dated September 1, 1991, which was held on January 29, 1992.

By decision dated April 16, 1992, the hearing representative affirmed the August 7, 1991 decision. The hearing representative relied upon the opinion of Dr. Franzblau, to find that the evidence failed to establish that appellant's disability was causally related to his employment.

Appellant requested reconsideration by letter dated April 13, 1993 and submitted medical and factual evidence in support of his request including various articles on the effects of exposure to pesticides and organophosphates and a Social Security decision accepted his claim for disability retirement. Appellant also submitted an April 2, 1993 report by Dr. William F. Durham and an April 3, 1993 report by Dr. Gary P. Bond regarding the toxicity of organophosphates and pesticides. Dr. Kieran opined that, "due to the profundity of [appellant]'s sensory loss, documented on two EMG's [electromyograms], without other known causation for peripheral neuropathy in this man, I believe that this does represent a toxic effect due to chronic exposure" to the pesticides and organophosphates.

In a September 4, 1991 letter, Dr. Melvin D. Reuber, a Board-certified anatomic pathologist, noted that "changes in cholinesterase levels correlate well with neurological symptoms" and that "many chemicals are known to act synergistically, particularly organophosphates and carbonate."

In a letter dated September 26, 1991, Dr. Reuber stated that the pesticides appellant was exposed to could cause neuropathy and peripheral neuropathy as they were neurotoxins. He noted that "the organophosphates -- Vapona and malathion -- and the chlorophenoxys -- 2,4-D and MCPP -- and the carbamate -- aldicarb -- can all be implicated" and that "these substances can act additively or synergistically to increase the likelihood of adverse health effects."

In a December 23, 1992 report, Dr. R. Michael Kelly, diagnosed multiple chemical sensitivities, reactive airways disease, mitral valve prolapse, early renal failure and ataxic neuropathies secondary to a diffuse sensory neuropathy. As the cause of appellant's ataxic neuropathies, Dr. Kelly opined:

> "There seems little question that [appellant's] primary neurologic problem is a direct result of his sensory neuropathy. The use of words such as ataxic neuropathy, are of course not diagnostic, but rather descriptive of the general neurologic deficit. Given the extensive work-up and evaluation, clearly this ataxic neuropathy seems most directly a result of the diffuse polysensory neuropathy, which has been well documented and worked up. There seems to be some disagreement as to the causation of this sensory neuropathy. Again there has been extensive evaluation and work-ups looking for a metabolic, vascular and heavy metals, all of which seem to be rather negative, although there are some low concentrations of heavy metals. I would not deem that these are primary in the development of the sensory neuropathy. On the other hand, [appellant] had a long history of exposures to organophosphates and other neurotoxins used in his work at the [employing establishment]. The tissue levels clearly document exposures and certainly many are in excess of a 'normal' unexposed population. Human epidemologic studies with respect to each of these chemicals and the reports of similar sensory neuropathies are difficult to find. On the other hand, all of these materials can be shown in laboratory settings to produce this type of neuropathy. Studies of human cohorts exposed to organophosphate and organochlorine pesticides and herbicides do show similar polysensory neuropathies. There seems little question that the cause of [appellant's] neurologic problems are these chemical exposures. Furthermore, there are cholinesterase levels that are low during his work experience, another rather straight-forward sign of toxicity.

Dr. Kelly also concluded that appellant's multiple chemical sensitivities and reactive airway disease represented "some immune abnormalities" which were "secondary to the organophosphate and insecticide/herbicide exposures."

A March 29, 1993 report from Dr. Davey reviewed the reports of Drs. Franzblau, Cassano, Kieran, Kelly and Albers. She noted that the opinion expressed by Drs. Franzblau and Cassano regarding pesticides and neuropathy was contrary to the medical literature and textbooks regarding organophosphates and ataxic neuropathy. Dr. Davey opined that appellant "has a severe sensory peripheral neuropathy well documented on four EMG's" and that "without other known or proven causes for his peripheral neuropathy, it is my opinion (and the opinion of other experts) that [appellant] has a toxic sensory peripheral polyneuropathy" caused by his pesticide exposure.

On September 15, 1993 appellant submitted a June 22, 1993 report by Dr. Steven E. Newman, a Board-certified neurologist, and various articles on organophosphates and pesticide effects. Dr. Newman diagnosed "multiple toxic neuropathy distal greater than proximal, secondary to multiple chemical exposure (organophosphate type, chronic)." He also noted that

there was little or no evidence supporting that his condition was not due to his multiple chemical exposures.

By decision dated April 8, 1994, the Office denied modification of the denial of the April 16, 1992 decision.

Appellant requested reconsideration by letter dated April 5, 1995 and submitted additional evidence in support of his request.

On April 26, 1995 the Office denied modification of its April 18, 1994 decision.

By letter dated January 30, 1996, appellant requested reconsideration and provided legal argument as well as submitting evidence in support of his request. Appellant contended that Dr. Franzblau could not be considered the weight of medical opinion as he had been referred to Dr. Rubin to resolve the conflict in the medical evidence.

In an April 6, 1995 report, Dr. Kelly clarified his reasoning regarding the cause of appellant's condition. He stated:

> "The issues that strongly point to a workplace-related etiology are several and quite striking and again my apologies if I was not clear in my letter of December 23, 1992. Cholinesterase levels fell on several occasions while he was employed. This fact is a very strong and striking piece of evidence that toxicity to organophosphates was occurring. Organophosphates clearly are involved in the development of neurological deficits, both central and peripheral in nature. The presence of myelin antibodies is another indication that pathology is existing within the neurologic system and certainly there is no question that a significant neurologic impairment exists. [F]inally, there is evidence of tissue concentration of several insecticides and organophosphates pesticides. I am confused by the conclusion that there are some possible contaminated foods that are responsible for the elevated pesticide. Food contamination would be a most unlikely source for these levels, certainly given the very strong history of use and exposure that occurred in the course of his employment."

In an April 11, 1995 report, Dr. Gunnar Heuser, Ph.D., based upon a review of the medical records, concluded that appellant's condition was due to his pesticide exposure at his employment.

By decision dated May 2, 1996, the Office denied modification of the April 26, 1995 decision. The decision did not address appellant's contentions regarding the reports of Dr. Franzblau.

Appellant requested reconsideration by letters dated April 24 and 25, 1997 and submitted medical evidence, articles on the effects of organophosphate exposure and other factual evidence.

In a November 4, 1996 report, Dr. Newman opined that appellant's current condition was directly due to this multiple exposures to chemical insecticide, fungicide and herbicide at his employment.

Dr. Kelly, in a November 11, 1996 letter, stated that he was "not confused, nor was I confused, about contaminated foods being possibly a source for pesticide poisoning." He concluded that there was no evidence to support a relationship between appellant's condition and pesticide poisoning in the food he ingested.

In a December 31, 1996 report, Dr. Kelly diagnosed ataxic neuropathy. He attributed this condition to appellant's organophosphate poisoning as "the falls in cholinesterase levels and the type of neuromuscular disorder are quite consistent with organo-phosphate poisoning."

By decision dated November 2, 1999, the Office denied modification of its prior decisions.

Appellant appealed the denial of his claim to the Board. By decision dated October 23, 2001, the Board remanded the case for reconstruction of the record noting that the record submitted on appeal was incomplete.[3] On remand the Office was to issue an appropriate decision to preserve appellant's appeal rights

By decision dated March 1, 2002, the Office denied modification of its prior decisions.

The Board finds that this case is not in posture for a decision due to an unresolved conflict in the medical opinion.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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 claimant.[4]

The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, showing a causal relationship between the claimed conditions and his federal employment.[5] Neither the fact that the condition became manifest during a period of federal employment, nor the belief of appellant

[3] Docket No. 00-1112, (issued October 23, 2001).

[4] *See Arturo A. Adame*, 49 ECAB 421, 424-25 (1998).

[5] *Betty J. Smith*, 54 ECAB ___ (Docket No. 02-149, issued October 29, 2002); *Richard O'Brien*, 53 ECAB ___ (Docket No. 00-1665, issued November 21, 2001).

that the condition was caused or aggravated by his federal employment, is sufficient to establish causal relation.[6]

It is well established that a physician selected by the Office to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment.[7] To this end, the Office has developed specific procedures pertaining to the selection of an impartial medical specialist and the nature of the evaluation conducted. In *Leonard W. Waggoner*,[8] the Board noted that the procedures contemplate that an impartial medical specialist will be selected on a strict rotational basis to negate any appearance that preferential treatment exists between a particular physician and the Office. If the impartial medical specialist is not selected on a rotational basis, this objective is not met.

In the present case, the Office accepted that appellant sustained pesticide toxicity. In order to resolve a conflict of medical opinion regarding whether appellant's neuropathy condition was due to the accepted pesticide toxicity, the Office properly referred appellant to Dr. Rubin.[9]

Dr. Rubin referred appellant to various physicians for neurological and occupational health consultations, including Dr. Franzblau. The Board notes that the Office did not select Dr. Franzblau to serve as the impartial medical specialist. The record reflects that, following receipt of Dr. Franzblau's July 1, 1990 report, the Office denied appellant's claim. The August 7, 1991 decision found the weight of medical opinion to be represented by the reports of Dr. Franzblau. However, appellant was referred to Dr. Rubin as the impartial medical specialist. The record does not reflect that Dr. Rubin ever submitted a final report to the Office following the referrals he made for medical consultations in neurology and occupational health. For this reason, the Board finds that Dr. Franzblau's July 1, 1990 report cannot be afforded special weight or be used to resolve the outstanding conflict.[10]

Accordingly, the case will be remanded to the Office for referral of appellant, the case record and a statement of accepted facts, to an appropriate impartial medical specialist or panel of specialists to be selected in accordance with the Office's procedures. After such further development of the record as it deems necessary, the Office shall issue a *de novo* decision.

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[6] *Donna L. Mims*, 53 ECAB ___ (Docket No. 01-1835, issued August 13, 2002); *Lucrecia M. Nielsen*, 42 ECAB 583, 593 (1991); *Joseph T. Gulla*, 36 ECAB 516, 519 (1985).

[7] *See Raymond E. Heathcock*, 32 ECAB 2004 (1981).

[8] 37 ECAB 676 (1986).

[9] Section 8123 of the Act provides: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination." 5 U.S.C. § 8123; *see James M. Frasher*, 53 ECAB ___ (Docket No. 01-362, issued September 25, 2002).

[10] *Saundra B. Williams*, 53 ECAB ___ (Docket No. 00-380, issued February 6, 2002); *Leonard W. Waggoner*, *supra* note 8.

The March 1, 2002 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further development consistent with the above opinion.

Dated, Washington, DC
May 14, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member