

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

D.C., Appellant)

and)

DEPARTMENT OF COMMERCE, NATIONAL)
OCEANIC & ATMOSPHERIC)
ADMINISTRATION, NATIONAL OCEAN)
SERVICE, Murrells Inlet, SC, Employer)

**Docket No. 07-1044
Issued: February 1, 2008**

Appearances:
Paul Felser, Esq., for the appellant
No Appearance, for the Director

Oral Argument December 18, 2007

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 7, 2007 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated December 8, 2006 denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the December 8, 2006 nonmerit decision. As the most recent merit decision in the case was issued on March 25, 2005, more than one year prior to appellant filing her appeal, the Board does not have jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

The Office accepted that, on or before May 1985, appellant, then a 30-year-old reef fish field technician and biological technician, sustained chronic ciguatera poisoning due to handling

contaminated tropical fish in the performance of duty. She first experienced symptoms in 1985, beginning with a persistent, blistering rash on her hands. This progressed to systemic musculoskeletal, neurologic, dermatologic and immunologic manifestations. Appellant was last exposed to fish on September 15, 2000. She received appropriate compensation beginning on July 1, 2001.

Appellant submitted reports from July 1993 through June 2000 noting diagnoses of allergies to dust mites, mold, cats and grasses, dermatologic conditions, itching related to perimenopause, lichen simplex, stress incontinence, mucosal thickening in the left maxillary ostium and mood swings. Dr. William R. Gammon, an attending Board-certified family practitioner, submitted reports from May 29 to December 14, 2000 attributing appellant's symptoms to depression. He noted that testing did not reveal suspected heavy metal poisoning.

In reports from December 4, 2000 through January 18, 2001, Dr. Jeff A. Benjamin, an attending osteopathic physician, noted appellant's complaints of sinusitis, musculoskeletal pain, paresthesias, weakness, fatigue, dermatologic conditions, confusion, memory loss and visual disturbances. He ordered an electrocardiogram, blood tests, a brain magnetic resonance imaging scan and nerve conduction velocity studies of the right tibial muscles, all of which were within normal limits. Dr. Benjamin opined that there was no organic explanation for appellant's symptoms.

In a March 28, 2001 report, Dr. Ritchie C. Shoemaker, an attending Board-certified family practitioner, noted appellant's symptoms of "abdominal pain, nausea, diarrhea, shortness of breath, cough, sinus congestion, cognitive impairment, fatigue, muscle aches, cramps, dysesthesias, metallic taste, sensitivity to bright light, headache, pruritis and burning of her skin with contact by water or fish parts." He opined that these symptoms were due to chronic ciguatera poisoning, contracted transcutaneously by handling fish tissues of the snapper-grouper complex at work. Dr. Shoemaker stated that appellant's presentation was typical of chronic ciguatera poisoning as she had an objective decrease in visual contrast sensitivity and her symptoms were exacerbated by alcohol consumption and eating sweet foods. In an April 17, 2001 letter, he stated that appellant was responding well to his neurotoxin binding treatment.

In a July 5, 2001 report, Dr. Jonathan Simons, an attending licensed clinical psychologist, reviewed Dr. Shoemaker's reports. He diagnosed an adjustment disorder with depressed mood and paranoid personality features related to neurotoxin induced organic brain syndrome secondary to neurotoxins.

In August 21, 2001 letters, the employing establishment asserted that ciguatera poisoning was acquired only by ingestion, not by handling fish.

In a December 17, 2001 letter, the Office requested a supplemental report from Dr. Shoemaker explaining why he diagnosed ciguatera poisoning.¹

On August 9, 2002 the Office referred appellant, the medical record and a statement of accepted facts to Dr. Charles S. Jervey, a Board-certified neurologist, for a second opinion

¹ Appellant received medical management nurse services from December 2001 through May 1, 2002.

examination. In an October 17, 2002 report, Dr. Jervey reviewed the record and noted performing a search of recent medical literature. He stated that some of appellant's symptoms were "potentially caused by ciguatera" but were nonspecific and could be caused by a variety of other etiologies. Dr. Jervey noted that his search of medical literature and neurologic texts revealed "no documented cases of a patient becoming poisoned from ciguatera through handling of fish or fish parts. All documented cases were caused by ingestion of fish." Also, appellant had no objective findings to support ciguatera poisoning. Dr. Jervey opined that appellant's symptoms were not due to ciguatera poisoning as they had not improved overtime, whereas documented ciguatera cases usually showed improvement with time. He noted that Dr. Benjamin, a psychologist, was not competent to diagnose ciguatera poisoning or organic brain dysfunction. Dr. Jervey found appellant able to return to work four hours a day, with restrictions against heavy lifting, climbing, heights and handling fish.

In a December 27, 2002 letter, the Office asked Dr. Shoemaker to review Dr. Jervey's report and explain his agreement or disagreement. Dr. Shoemaker did not respond.

By notice dated January 30, 2003, the Office advised appellant that it proposed to terminate her compensation benefits on the grounds that there was no objective evidence or support in medical literature that she contracted ciguatera poisoning.

In a February 28, 2003 letter, appellant asserted that she had chronic ciguatera poisoning and was totally disabled for work, as confirmed by Dr. Shoemaker.

By decision dated March 3, 2003, the Office terminated appellant's compensation effective that day on the grounds that her accepted ciguatera poisoning had ceased without residuals. The Office found that Dr. Jervey's opinion represented the weight of the medical evidence.

In a March 10, 2003 letter, appellant requested an oral hearing, held December 16, 2003. At the hearing, she testified that there was a commercially available test for ciguatera poisoning.² Appellant asserted that Dr. Jervey was a neurologist and not a Board-certified toxicologist. In a February 27, 2003 report, Dr. Shoemaker again asserted that appellant contracted ciguatera poisoning transcutaneously, through skin punctures sustained while handling fish. He contended that Dr. Jervey ignored appellant's visual contrast deficit and melanocyte stimulating hormone (MSH) deficiency, both objective signs of dinoflagellate toxicity such as ciguatera poisoning. Dr. Shoemaker asserted that his opinion was confirmed by recent medical studies. He did not submit copies of these studies.

The employing establishment terminated appellant's employment as of June 16, 2003 as she could no longer perform the essential functions of her position and no work was available within her restrictions.

By decision dated March 18, 2004, an Office hearing representative affirmed the March 3, 2003 decision terminating appellant's compensation. The hearing representative found that Dr. Jervey's opinion as a neurologist was of greater weight than Dr. Shoemaker's opinion as

² Appellant submitted internet information regarding a ciguatera toxin test kit to identify the poison in fish.

a family practitioner. The hearing representative noted that the ciguatera test that appellant referred to at the hearing was for testing fish flesh, not humans.

In an August 10, 2004 letter, appellant requested reconsideration, stating that she would submit additional evidence. In a February 26, 2005 letter, her attorney requested an extension of time.

By decision dated March 9, 2005, the Office denied reconsideration on the grounds that appellant's August 10, 2004 and March 9, 2005 letters neither raised substantive legal questions nor included new and relevant evidence.

In a March 16, 2005 letter, appellant requested reconsideration. She asserted that Dr. Shoemaker's extensive and unique qualifications in biotoxin research made his opinion more probative to that of Dr. Jervey. In a June 14, 2004 report, Dr. Shoemaker found that appellant met the criteria for chronic fatigue syndrome. He opined that ciguatera poisoning was the only explanation for appellant's many symptoms and a MSH level too low to measure. Dr. Shoemaker found appellant totally disabled for work. Appellant also submitted internet information about Dr. Shoemaker and his curriculum vitae.

By decision dated March 25, 2005, the Office denied modification. The Office found that Dr. Jervey provided sufficient rationale explaining that there was no research supporting Dr. Shoemaker's contention that ciguatera poisoning could occur transcutaneously through handling infected fish.

In a March 24, 2006 letter, appellant, through her attorney, requested reconsideration. The attorney asserted that Dr. Jervey's opinion contained significant errors. He quoted an internet fact sheet and a medical study stating that, contrary to Dr. Jervey's opinion, the symptoms of ciguatera poisoning could persist for years. The attorney also quoted a study stating that "[a]s cleaning ciguateric fish can cause tingling of the hands and eating them can cause altered sensation in the oral cavity and dysphagia ... it would appear that ciguatoxins can penetrate the skin and mucous membranes."³ There is no copy of the study of record.

Appellant also submitted an April 12, 2006 letter from Dr. Shoemaker, reiterating that she had ciguatoxin poisoning as evidenced by low MSH levels and an abnormal visual contrast sensitivity test. Dr. Shoemaker did not mention the study and fact sheet cited to by appellant's attorney.

By decision dated December 8, 2006, the Office denied reconsideration on the grounds that the evidence submitted was insufficient to warrant reopening the case on its merits. The Office found that appellant's March 24, 2006 letter contained no new, relevant evidence or argument and was repetitive of her March 16, 2005 letter. The Office also found that Dr. Shoemaker's April 12, 2006 letter was repetitive and cumulative.

³ Excerpt from "Lehane, L. (1999) *Ciguatera fish poisoning: a review in a risk-assessment framework*. National Office of Animal and Plant Health, Agriculture, Fisheries and Forestry -- Australia, Canberra. See page 25."

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁵ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁶

In support of her request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁷ The appellant need only submit relevant, pertinent evidence not previously considered by the Office.⁸ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.⁹

ANALYSIS

The Office accepted that appellant sustained chronic ciguatera poisoning based on the opinion of Dr. Shoemaker, an attending Board-certified family practitioner, who opined that appellant contracted ciguatera poisoning through small breaks in her skin caused by handling fish. The Office obtained an October 17, 2002 second opinion report from Dr. Jervey, a Board-certified neurologist, who found no objective signs of ciguatera poisoning. Dr. Jervey stated that no medical literature supported Dr. Shoemaker's opinion that ciguatera poisoning could occur transdermally. Also, he contended that appellant's symptoms persisted for years, whereas ciguatera poisoning usually resolved quickly. Based on Dr. Jervey's opinion, the Office terminated appellant's compensation benefits effective March 3, 2003 on the grounds that the accepted ciguatera poisoning ceased with no residuals.

Following an oral hearing, the Office affirmed the termination by March 18, 2004 decision and denied reconsideration by March 9, 2005 decision. Appellant requested reconsideration by March 16, 2005 letter, asserting Dr. Shoemaker's opinion outweighed Dr. Jervey's. The Office denied modification on March 25, 2005, finding that there was no

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at 10.608(b).

⁷ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁸ *See* 20 C.F.R. § 10.606(b)(3). *See also* *Mark H. Dever*, 53 ECAB 710 (2002).

⁹ *Annette Louise*, 54 ECAB 783 (2003).

support for Dr. Shoemaker's opinion that appellant contracted ciguatera poisoning transcutaneously.

Appellant requested reconsideration in a March 24, 2006 letter. Her attorney quoted brief excerpts from medical literature which he asserted supported Dr. Shoemaker's opinion. Appellant also submitted an April 12, 2006 letter from Dr. Shoemaker, reiterating his opinion that visual contrast and hormone tests demonstrated ciguatera poisoning. The Office denied appellant's request for reconsideration by December 8, 2006 decision, finding that appellant's March 24, 2006 letter contained no new, relevant evidence or argument and that Dr. Shoemaker's report was repetitive and cumulative.

The underlying issue is the causal relationship of appellant's diagnosed condition to her federal employment. Dr. Shoemaker opined that ciguatera poisoning could be contracted transcutaneously. To be relevant, the evidence submitted in support of the March 24, 2006 request for reconsideration must address that issue. Appellant's March 24, 2006 letter contained excerpts from medical literature. However, excerpts from publications and medical literature generally are not of probative value in establishing causal relationship as they do not specifically address the individual claimant's medical situation and work factors.¹⁰ Therefore, the March 24, 2006 letter is irrelevant to the critical issue in the case.¹¹ Dr. Shoemaker's April 12, 2006 letter reiterates his opinion that visual contrast and hormone tests indicated that appellant sustained ciguatera poisoning. However, evidence or argument which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.¹² The duplicative nature of this evidence does not require reopening the record for further merit review.

Thus, appellant has not established that the Office improperly refused to reopen her claim for a review of the merits under section 8128(a) of the Act, because she did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

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

¹⁰ *Gloria J. McPherson*, 51 ECAB 441 (2000).

¹¹ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹² *Denis M. Dupor*, 51 ECAB 482 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 8, 2006 is affirmed.

Issued: February 1, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board