

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALTER J. BOROWSKI, JR. and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Philadelphia, PA

*Docket No. 01-427; Submitted on the Record;
Issued March 27, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

The Board has reviewed the case record and finds that the Office properly denied appellant's request for reconsideration.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed the appeal with the Board on November 29, 2000, the only decision before the Board is the Office's August 31, 2000 decision, denying appellant's request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of Federal Employees' Compensation Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.² A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).³

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² Section 10.606(b)(2) (i-iii).

³ Section 10.608(a).

On August 25, 1995 appellant, then a 46-year-old claims representative, filed an occupational claim alleging that on July 28, 1995 he became aware that symptoms he had at work of dizziness, tightness in his chest, burning in his lung and esophagus, shortness of breath, fatigue, inability to concentrate and to speak coherently, and headaches were related to poor air circulation at work and exposure to musty odors, fumes of alcohol, ammonia or diesel. He last worked on August 3, 1995. To support his claim, appellant submitted statements explaining how his symptoms began and an article on multiple chemical sensitivity (MCS) syndrome and its causes.

By decision dated January 16, 1996, the Office denied the claim stating that the evidence of record failed to establish a fact of injury.

Appellant requested an oral hearing which was held before an Office hearing representative on September 30, 1997. He submitted additional evidence.

In a report dated February 24, 1997, appellant's treating physician, Dr. Harold E. Buttram, a general practitioner, considered appellant's history of injury, performed a physical examination and reviewed diagnostic tests including a cardiac catheterization and an electrocardiogram. Dr. Buttram's diagnoses included MCS syndrome, Ehlers-Danlos syndrome, hypertension and allergic rhinitis. He concluded that appellant was totally disabled, primarily due to the MCS syndrome and its complications, and that appellant could not return to his former workplace without rapid and serious deterioration of his health due to chemical exposures.

In a report dated August 14, 1997, appellant's treating physician, Dr. Marilyn V. Howarth, a Board-certified internist, considered appellant's history of injury and diagnosed MCS syndrome and situational depression/anxiety disorder. He also submitted an article on the "Evaluation of Chemically Sensitive Patients," dated May 1992.

By decision dated December 16, 1997, the Office hearing representative affirmed the Office's January 16, 1996 decision.

In an undated letter received by the Office on September 16, 1997, appellant requested reconsideration of the Office's decision.

By decision dated December 7, 1998, the Office denied appellant's request for reconsideration.

By letter dated December 15, 1998, appellant requested reconsideration of the Office's decision and submitted additional evidence. In his request, he contended that the Office failed to develop any indoor air quality testing and did not seek an evaluation by a clinical ecologist. In a report dated February 24, 1999, appellant's treating physician, Dr. Henry C. Yeager, a Board-certified internist, considered appellant's history of injury, performed a physical examination and stated that appellant "had been followed for signs and symptoms of glomerulonephropathy from the beginning" and his "very complex environmental exposure history" might have a bearing on it. Dr. Yeager stated that appellant should "continue to avoid those environmental influences which he is subject to."

In an undated report received by the Office on December 21, 1998, Dr. Leander T. Ellis, a Board-certified psychiatrist and neurologist, considered appellant's history of injury, performed a physical examination and diagnosed porphyriopathy with secondary MCS syndrome. Dr. Ellis stated that appellant was unemployed secondary to his inability to tolerate most work environments and that he reported "mild-to-moderate levels of distress most days with sharp accentuation of discomfort and impaired concentration following exposure to fumes." She stated that appellant's vulnerabilities rendered him unable to function in the usual work environment.

By decision dated June 25, 1999, the Office denied appellant's request for modification.

By letter dated June 21, 2000, appellant requested reconsideration of the Office's decision and submitted evidence consisting of a copy of the Office's June 25, 1999 decision, Dr. Yeager's February 24 and August 30, 1999 reports, a report from Dr. Ellis dated August 28, 1999, a copy of a Social Security Administration decision dated October 19, 1999 awarding appellant disability benefits as of August 3, 1995, results of an echocardiogram dated January 12, 1999 and results of chemical and blood tests and surveys. In his request, he contended that the Office "systematically ignored all of the findings in the reports submitted and [it] failed to rebut the medical evidence" which showed deterioration in his health due to environmental conditions.

In her August 28, 1999 report, Dr. Ellis considered appellant's history of injury, performed a physical examination and reiterated her diagnoses of porphyriopathy with secondary multiple chemical hypersensitivity. She stated that appellant's vulnerabilities rendered him unable to function in his usual and any attempt to return to an uncontrolled environment was "highly likely to accelerate tissue damage with serious consequences."

In his August 30, 1999 report, Dr. Yeager additionally diagnosed Ehlers-Danlos syndrome and mild aortic insufficiency and stated that appellant "had improved lately with his diminished environmental exposure to toxins to which he [was] very sensitive." He stated that appellant was stable but could not return to his previous work environment.

By decision dated August 31, 2000, the Office denied appellant's request for reconsideration.

In this case, the evidence appellant submitted in support of his request for reconsideration is repetitive or duplicative of evidence that was contained in the record. Appellant had previously submitted Dr. Yeager's February 24, 1999 report. In his August 30, 1999 report, Dr. Yeager additionally diagnosed Ehlers-Danlos syndrome and mild aortic insufficiency, stated that appellant had improved with diminished environmental exposure to toxins and reiterated that appellant could not return to his previous work environment. In his February 24, 1997 report, Dr. Buttram diagnosed Ehlers-Danlos syndrome and opined that appellant should not return to his usual work environment. Dr. Yeager's opinion that appellant should not return to his previous work environment is duplicative of his prior opinion and Dr. Buttram's opinion. Dr. Ellis' August 28, 1999 report in which she diagnosed porphyriopathy with secondary multiple chemical hypersensitivity and stated that appellant's vulnerabilities rendered him unable to function in his usual environment is duplicative of her December 21, 1998 opinion. The Social Security Administration decision dated October 19, 1999 in which appellant was awarded

disability benefits is not determinative under Act.⁴ Further, the miscellaneous medical tests appellant submitted including the echocardiogram are not relevant to establishing whether appellant's condition is causally related to his employment.⁵ Appellant's argument that the Office ignored all the medical reports is not valid because the Office indicated that it considered appellant's medical reports and they were contained in the record.

Inasmuch as appellant did not show that the Office erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument or submit relevant and pertinent new evidence not previously considered by the Office, he has failed to establish his claim. The Office acted within its discretion in refusing to reopen the case on the merits.

The August 31, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
March 27, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

⁴ See *Donald E. Ewals*, 45 ECAB 111, 125; *Daniel Deparani*, 44 ECAB 657, 659-60 (1993).

⁵ See *Michael E. Smith*, 50 ECAB 313 (1999).