

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

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**D.I., Appellant**

**and**

**DEPARTMENT OF THE ARMY, MILITARY  
TRAFFIC MANAGEMENT SERVICE,  
Washington, DC, Employer**

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**Docket No. 07-1534  
Issued: November 6, 2007**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On June 6, 2007 appellant filed a timely appeal from the December 22, 2006 merit decision of the Office of Workers' Compensation Programs denying his claim. He also filed a timely appeal from the April 30, 2007 decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

**ISSUES**

The issues are: (1) whether appellant established that he sustained mantle cell lymphoma in the performance of duty as a result of his exposure to Agent Orange; and (2) whether the Office properly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On March 25, 2002 appellant, then a 74-year-old retired traffic management specialist, filed an occupational disease claim alleging that he suffered from mantle cell lymphoma (non-

Hodgkin's disease) as a result of exposure to herbicides during his federal service in Vietnam. He submitted a copy of an extract from the Department of the Army indicating that he was to be sent to Long Binh in the Republic of Vietnam for a 30-day period to commence on or about April 4, 1972. He also submitted a surgical pathology report dated December 3, 2001 indicating that he had mantle cell lymphoma.

By letter dated October 17, 2002, the Office requested that appellant submit medical evidence in support of his claim. In response, he submitted a December 24, 2002 medical report from Dr. Martin Gutierrez, a Board-certified internist, who stated:

“[Appellant] is a patient of mine, who is being seen and treated for the diagnosis of mantle cell lymphoma.

“I understand that [appellant] is a Vietnam veteran who worked as a military advisor in Vietnam during the Vietnam War in 1972 and during that time [he] states [that] he had been exposed to Agent Orange. This is based on data from the National Academies Press, new update in 2000, which has studied the evidence regarding association between disease and exposure to Dioxin and other chemicals. In herbicides used in Vietnam, the conclusion is that among the data there is evidence of a link between exposure and development of soft tissue sarcomas and non-Hodgkin's lymphomas in patients that have been exposed to them.”

Appellant submitted the results of a computed tomography of his abdomen and pelvis and thorax. He also submitted a copy of a publication for Vietnam veterans with regard to Agent Orange together with articles from the Cancer Control Journal and the Armed Forces Information Service.

By decision dated January 23, 2003, the Office denied appellant's claim for compensation finding that he had not established a causal relationship between the alleged exposure to Agent Orange and his mantle cell lymphoma.

On March 19, 2003 appellant requested reconsideration. At that time, he contended that in 1972 he was deployed to the Republic of Vietnam with the Armed Forces in Zone III Corps Area -- the area that received the heaviest concentration of Agent Orange spraying. Appellant indicated that he traveled extensively in this area visiting military and commercial shipping installations in order to complete his mission. He argued that Congress provided that anyone who served in Vietnam from January 9, 1962 through May 7, 1975 does not need to show exposure to herbicides to collect benefits and that it is the Federal Government's burden of proof to show that his disease was caused by factors other than his Vietnam service. Appellant submitted a copy of the schedule of activities for the transportation assistance team in Vietnam, a copy of a map from an internet site showing alleged areas of herbicide spray in missions in Vietnam and a copy of the Department of the Army *Civilian Employee Deployment Guide*.

By decision dated June 13, 2003, the Office denied appellant's request for reconsideration without further merit review.

On September 29, 2003 appellant again requested reconsideration of his claim. By letter dated November 6, 2003, the Office advised him that the only right of appeal he was afforded after the June 13, 2003 decision was an appeal and that accordingly, his case had been forwarded to the Employees' Compensation Appeals Board. On January 28, 2004 the Board dismissed the appeal at appellant's request, so that he could submit new evidence to the Office for reconsideration.<sup>1</sup>

On January 9, 2004 appellant requested reconsideration. He contended that the Office's denial of his claim violated the Veteran's Dioxin and Radiation Exposure Compensation Standards Act of 1984. Appellant contended that only a statistical association was required to prove that his illness resulted from exposure to Agent Orange.

By decision dated December 21, 2004, the Office denied appellant's request for reconsideration without further merit review.

By letter dated January 11, 2005 received on January 18, 2005, appellant filed an appeal with the Board. On June 7, 2005 the Board issued an order remanding case. Due to the Office's delay in transmitting the case record to the Board, the case was remanded for reconstruction and proper assemblage of the case record and the issuance of an appropriate decision to protect appellant's rights.<sup>2</sup>

By decision dated December 22, 2006, the Office denied appellant's claim for the reason that the medical evidence did not demonstrate that the claimed medical condition was related to the established work-related events.

On January 12, 2007 appellant requested reconsideration. He again contended that the Office's rules with regard to medical evidence of herbicide exposure and non-Hodgkin's lymphoma discriminated against civilians who served in Vietnam.

By decision dated April 30, 2007, the Office denied appellant's request for reconsideration without merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

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

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<sup>1</sup> Docket No. 04-381 (issued January 28, 2004).

<sup>2</sup> Docket No. 05-623 (issued April 6, 2005).

the specific employment factors identified by the claimant.<sup>3</sup> Causal relationship is medical in nature and can be established only by medical evidence. Newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship as they are of general application and are not determinative of whether the specific condition claimed was causally related to the particular employment injury involved.<sup>4</sup>

### ANALYSIS -- ISSUE 1

Appellant has established that he worked for the employing establishment in Vietnam for a one-month period in 1972. He alleges that, during that time, he was exposed to Agent Orange which gave rise to his mantle cell lymphoma. However, the Board finds that appellant has not provided sufficient medical evidence to establish that his mantle cell lymphoma (non-Hodgkin's disease) is related to his exposure to Agent Orange in Vietnam in 1972. The only medical evidence of record that addresses the issue of causal relationship is the opinion of Dr. Gutierrez, who noted that studies indicated a link between exposure to Agent Orange and the development of soft tissue sarcomas and non-Hodgkin's lymphomas. Dr. Gutierrez did not expand on this statement to explain whether appellant's mantle cell lymphoma (non-Hodgkin's disease) was caused by his exposure to Agent Orange in Vietnam. Moreover, his opinion is couched in generalities and is, accordingly, of diminished probative value and insufficient to establish appellant's claim. Dr. Gutierrez cited generally to medical studies to establish causal relationship without explaining the pathophysiological process of how appellant's exposure to Agent Orange caused or contributed to his diagnosed condition. The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.<sup>5</sup>

On February 6, 1991 Congress enacted Pub. L. No. 102-4, Stat. 11, which provided a statutory presumption of service connection for diseases sustained by veterans associated with exposure to certain herbicide agents.<sup>6</sup> Pursuant to this legislation, regulations were promulgated with listed diseases for which the presumption of service connection would apply. However, the legislation was made applicable to veterans in military service and not to civilian employees who also served in Vietnam. Appellant's contentions that the Office discriminated against civilian employees is without merit. The legislation enacted by Congress clearly provided the statutory presumption arises only in favor of military veterans. The Agent Orange Act was not made applicable to claims arising under the Federal Employees' Compensation Act. Therefore, appellant bears the burden of proof in establishing his claim for compensation.

This Board further notes that appellant submitted various articles about Agent Orange in support of his claim. However, these articles have no evidentiary value in establishing the causal relationship between his claimed condition and appellant's federal employment as such materials

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<sup>3</sup> *Solomon Polen*, 51 ECAB 441 (2000); *see also Michael E. Smith*, 50 ECAB 313 (1999).

<sup>4</sup> *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

<sup>5</sup> *See Norman E. Underwood*, 43 ECAB 719 (1992).

<sup>6</sup> Agent Orange Federal Employees' Compensation Act of 1991, Pub. L. No. 102-4 § 2, 105 Stat. 11 (1991) codified in part at 38 U.S.C. § 316 (2000).

are of general application and are not determinative of whether the specific condition claimed is related to particular employment factors or incidents.<sup>7</sup> The Board also notes that information with regard to other federal agencies is not dispositive with regard to questions arising under the Act.<sup>8</sup>

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment, nor his belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship. Causal relationship must be established by rationalized medical opinion evidence.<sup>9</sup> The Board finds that appellant failed to submit such evidence and the Office, therefore, properly denied his claim for compensation.

### **LEGAL PRECEDENT -- ISSUE 2**

To require the Office to reopen a case for merit review under section 8128(a) of the 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.<sup>10</sup>

Section 8128(b) provides that when an application for reconsideration 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 review on the merits.<sup>11</sup> Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>12</sup> Likewise, evidence that does not address a particular issue involved does not constitute a basis for reopening a case.<sup>13</sup>

### **ANALYSIS -- ISSUE 2**

In the instant case, appellant does not meet any of the criteria for reopening his case for review on the merits. His case was denied as he did not submit adequate medical evidence establishing a causal relationship between his mantle cell lymphoma and his exposure to Agent Orange in Vietnam. Appellant has not submitted any relevant or pertinent new evidence that addresses this issue. Furthermore, he has not provided any new legal arguments not previously

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<sup>7</sup> *Gloria J. McPherson*, 51 ECAB 441 (2000).

<sup>8</sup> *Henry C. Garza*, 52 ECAB 205 (2001).

<sup>9</sup> *See Dennis M. Mascarenas*, 49 ECAB 215 (1997).

<sup>10</sup> 20 C.F.R. § 10.606(b)(2)(i-iii).

<sup>11</sup> 20 C.F.R. § 10.606(b)(2).

<sup>12</sup> *Helen E. Paglinawan*, 51 ECAB 407, 591 (2000).

<sup>13</sup> *Kevin M. Fatzer*, 51 ECAB 407 (2000).

considered by the Office, nor has he shown that the Office incorrectly applied a specific point of law. All of appellant's assertions have been considered in prior opinions by the Office in this case. As he has not met any of the requirements for reopening his case for merit review under section 8128(a) of the Act, the Office properly denied reconsideration of appellant's case on the merits.

**CONCLUSION**

The Board finds that appellant has not established that he sustained mantle cell lymphoma as a result of his exposure to Agent Orange while working in Vietnam during the war, as alleged. Furthermore, it finds that the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated April 30, 2007 and December 22, 2006 are affirmed.

Issued: November 6, 2007  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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