U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ILA KENNEDY, claiming as widow of THEODORE F. KENNEDY and DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Mount Hope, W.Va.

Docket No. 96-381; Submitted on the Record;
Issued September 18, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether the employee's death on February 12, 1992 was causally related to his accepted chronic obstructive airways disease.

On March 25, 1992 appellant, the employee's widow, filed a claim for survivor benefits alleging that the employee's death from pulmonary insufficiency due to adenocarcinoma of the lung was causally related to his accepted pulmonary condition.[1] The employee in this case, formerly a coal mine inspector, died on February 12, 1992. The death certificate reported the cause of death as progressive respiratory insufficiency due to extensive bronchogenic carcinoma of the right lung with metastases to the pericardial space. The death certificate further indicated that an autopsy was not performed.

In support of her claim appellant submitted a November 19, 1992 medical report from Dr. Joseph A. Maiolo, a Board-certified internist, and a November 20, 1992, medical report from Dr. Donald L. Rasmussen, a Board-certified internist, each of whom opined that the employee's death was due to a combination of his chronic pulmonary insufficiency and his pulmonary malignancy, with metastases.

On October 23, 1992 after a period of medical and factual development, the Office issued a decision denying appellant's claim for benefits on the grounds that the medical evidence of record was insufficient to establish that the employee's hospitalization and subsequent death were causally related to the employee's accepted conditions.

Appellant disagreed with the decision and requested a hearing before an Office representative.

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[1] On June 21, 1973 the Office of Workers' Compensation Programs accepted the employee's claim for internal derangement of the left knee and aggravation of pulmonary insufficiency.

In a decision dated June 1, 1993, the Office hearing representative found the case not in posture for a hearing on the grounds that the medical evidence of file was sufficient to require further development of the claim. The hearing representative vacated the prior decision of the Office and remanded the case for referral to a second opinion physician and a *de novo* decision.

By letter dated August 3, 1993, they forwarded a statement of accepted facts and the entire case file to Dr. Thomas Beller, a Board-certified internist, for an opinion as to whether the employee's death was solely due to bronchogenic carcinoma of the lung with widespread metastases and whether the employee's accepted pulmonary condition would have predisposed him to the development of bronchogenic carcinoma of the lung or materially hastened his death.

In his report dated August 24, 1993, Dr. Beller stated that the employee died solely due to metastatic bronchogenic carcinoma and that although he had other medical conditions, including chronic obstructive airways disease, these conditions were incidental and were not related to his death.

By letter dated November 5, 1993, the Office forwarded a statement of accepted facts and the entire case file to Dr. H. William Barkman, a Board-certified internist, and asked that he respond to the same questions earlier posed to Dr. Beller.[2]

In a report dated March 18, 1994, Dr. Barkman opined that the employee's death due to lung cancer was unrelated to his accepted conditions; however, he further indicated that he could not provide a definitive opinion without additional medical evidence such as an autopsy report and chest x-rays.

By letter dated April 8, 1994, the Office forwarded a statement of accepted facts and the entire case file to Dr. Vito A. Angelillo, a Board-certified internist, and asked that he respond to the same questions earlier posed to Drs. Beller and Barkman.[3]

In a report dated April 18, 1994, Dr. Angelillo opined that the employee's death was solely due to adenocarcinoma and that chronic obstructive pulmonary disease or coal workers' pneumoconiosis were not factors at all.

In a decision dated June 1, 1994, the Office denied appellant's claim for survivor benefits, finding that the weight of the medical evidence, represented by the well-reasoned opinion of Dr. Angelillo, the impartial medical specialist, was insufficient to establish that the employee's hospitalization and subsequent death were causally related to his accepted conditions.

By letter dated June 21, 1994, appellant requested an oral hearing before an Office hearing representative, and a hearing was held on June 28, 1995. At the hearing appellant

[2] It appears that the Office determined that a conflict existed between Drs. Beller and Rasmussen, and that the claim file was forwarded to Dr. Barkman for an impartial medical evaluation.

[3] The Office appears to have determined that Dr. Barkman's opinion was insufficiently definitive and after several attempts to obtain clarification from him, selected Dr. Angelillo as a new impartial medical specialist.

submitted a June 21, 1995 report from Dr. Rasmussen, in which the physician opined that while adenocarcinoma of the lung was the primary cause of the employees' death, coal workers' pneumoconiosis was a significant contributing factor.

In a decision dated August 14, 1995, the Office hearing representative denied appellant's claim for survivor benefits, affirming the Office' June 1, 1994 decision. The hearing representative specifically found that the Office had properly determined that a conflict in medical opinion existed which required referral to an impartial medical specialist. The hearing representative further found that the Office further properly selected Dr. Angelillo to act as a new impartial medical specialist when attempts to obtain a clarifying opinion from Dr. Barkman were unsuccessful, and that Dr. Angelillo's opinion, that the employee's death was unrelated to his accepted lung condition, represented the weight of the medical opinion evidence of record.

The Board finds that this case is not in posture for a decision due to the need for additional medical development.

Section 8123(a) of the Federal Employees' Compensation Act provides that "[i]f 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."[4] The opinion of the physician selected by the Office, called an impartial medical examiner or independent medical specialist, if sufficiently well rationalized and based upon a proper factual background, must be give special weight.[5] In this case, the Office found a conflict in medical opinion to exist between the employee's attending physicians, Drs. Rasmussen and Maiolo, and Dr. Beller, the Office second opinion physician.

To resolve the conflict in the medical opinion the Office initially referred this claim to Dr. Barkman. After determining that Dr. Barkman's report was not sufficiently definitive and after several unsuccessful attempts to obtain clarification or elaboration from Dr. Barkman, the Office selected Dr. Angelillo as the new impartial medical examiner.[6] In an April 14, 1994 report, although Dr. Angelillo initially expressed doubt that the employee actually suffered from coal workers' pneumoconiosis or chronic obstructive pulmonary disease, he concluded that these conditions, even if present, were not factors at all in the employee's death, stating:

> "Even if we accept the conditions of chronic obstructive pulmonary disease and CWP, I do not feel that they were contributory in the development of

[4] 5 U.S.C. § 8123(a).

[5] *Gary R. Sieber*, 46 ECAB 215 (1994).

[6] Where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the impartial specialist for the purpose of correcting the defect in the original report. *Nancy Lackner*, 40 ECAB 232 (1988). However, when the impartial specialist's statement of clarification or elaboration is not forthcoming or if the physician is unable to clarify or elaborate on his original report or if the supplemental report is also vague, speculative or lacks rationale, the Office must refer appellant to a second impartial specialist for a rationalized medical report on the issue in question. *James C. Talbert*, 42 ECAB 974 (1991); *Margaret Ann Connor*, 40 ECAB 214 (1988).

> adenocarcinoma of the lung. Numerous studies have shown that the development of bronchogenic carcinoma, even in cigarette smoking miners, is less than the normal population. The culprit for [appellant] was his 40 plus years of cigarette smoking which led to the development of carcinoma of the lung. This is known to be the contributing factor, even for adenocarcinoma, which had previously been thought not to be related to cigarette smoking.
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> "In summary, I feel that the patient's bronchogenic carcinoma of the lung with metastases was responsible for [appellant's] death and there is no evidence to support that any accepted conditions predisposed [appellant] to the development of the lung cancer."

At the hearing, appellant testified that the employee was never a regular smoker, and that the smoking history on which Dr. Angelillo relied was inaccurate. Appellant's argument is not without merit. Dr. Angelillo relied on a smoking history of more than 40 years and the record does contain some support for this history, as documented in a medical report dated January 19, 1973 from Appalachian Regional Hospital which states that the employee "has smoked one-half pack of cigarettes daily for 40 plus years." However, the record also contains a corrected copy of the same medical report in which several words have been crossed out so that the sentence reads that the employee "has smoked one-half pack of cigarettes at intervals for 10 plus years." In addition, the statement of accepted facts sent to Dr. Angelillo also indicates that the employee smoked cigarettes for about ten years, rather than the forty year history upon which Dr. Angelillo in part relied.[7] The Board finds that Dr. Angelillo's opinion does not appear to be based on a complete and accurate factual background and is based on information apparently inconsistent with the statement of accepted facts. Therefore, Dr. Angelillo's report cannot represent the weight of the medical evidence in this case.

Consequently, the case must be remanded for further medical development. On remand, the Office should prepare an updated statement of accepted facts and refer this together with the complete medical record, to Dr. Angelillo for a supplemental medical report based on the employee's correct smoking history.[8] After such further development as it may deem necessary, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated August 14, 1995 is set aside and the case remanded to the Office for further development of the evidence, to be followed by an appropriate decision.

Dated, Washington, D.C.

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[7] The original statement of accepted facts in this case is dated March 29, 1979, and states: "Claimant also has smoked one-half to one pack of cigarettes daily at intervals during the last 10 years." This same sentence is also contained in the updated statement of accepted facts dated July 1, 1993, sent to Dr. Angelillo. As appellant quit smoking in 1982 and died on February 12, 1992, the sentence does not appear to pertain to the 10-year period preceding the date of the amended statement of facts, but rather to the 10-year period preceding the date of the March 29, 1979 statement of accepted facts.

[8] *See Nancy Lackner*, *supra* note 6.

September 18, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member