United States Department of Labor
Employees' Compensation Appeals Board

JUDY A. HARSH, Appellant, claiming as widow of DENNIS D. HARSH	)	
and	)	**Docket No. 05-380**
	)	**Issued: October 3, 2005**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Boulder City, NV, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 30, 2004 appellant filed an appeal from decisions of the Office of Workers' Compensation Programs dated August 24 and November 2, 2004 in which the Office denied her claim for death benefits on the grounds that she had not established that the employee's death was caused by his federal employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish that the employee's death was causally related to factors of his federal employment.

FACTUAL HISTORY

On September 18, 2001 appellant, the employee's widow, filed a claim, alleging that the death of her husband on May 22, 2001 was causally related to his federal employment. The

employee was a 54-year-old supervisory mine inspector at the time of his death. In a supporting statement, appellant contended that the following factors contributed to the employee's death: a 1999 detail to Elko, Nevada where he had been required to work 10 to 14 hours per day for 7 days a week; that he did not receive promised secretarial help, necessitating that he volunteer in this capacity for 30 to 40 hours per week until the employing establishment investigated this practice, after which the employee was given a letter of warning and he had to quit; general overwork of 10 hours per day Monday through Friday and 5 hours per day on Saturday and Sunday; being the lead investigator of a fatality at the Rattlesnake Pit mine in Utah, after which she and the employee received threatening telephone calls, necessitating that he consult with the Federal Protective Service about his and his family's safety; that he had to handle disciplinary problems regarding two inspectors up until the day before his death. Appellant also asserted that the employee had told employing establishment management that he wished to relinquish his supervisory position and return to his previous mine inspection duties.

Appellant also submitted a report dated July 16, 2001 in which Dr. Robert E. Kessler, a Board-certified osteopath specializing in manipulative medicine, stated:

> "[The employee] is a patient who never had cardiac complaints and who had an acute myocardial infarction and died without warning in the early morning hours. I have been asked if stress could have been the factor in this problem. The answer is yes, it could have. Stress is frequently a contributing factor to acute myocardial infarction.
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> "I think that this is especially true in a relatively young man who had had no symptoms of heart disease in the past. Additionally, in [his] case, I am told by the people who harvested his heart valves for heart transplantation, that his coronary arteries looked fairly clear, so these were more likely not the biggest contributing factor. Additional evidence that could point to stress as a factor in this condition is that it occurred in the early morning hours when the adrenalin levels in a person are normally at their highest."

In an attending physician's report dated September 18, 2001, Dr. Kessler noted that he had previously treated the employee for the flu, back pain and renal stones but never for heart disease and that the employee had been brought to the emergency room in full arrest. He opined that the direct cause of death was a myocardial infarction and a contributing cause was stress. Dr. Kessler stated that "[patient] relayed stress and long hours (through wife)."

Appellant also submitted an ambulance report dated May 22, 2001, completed by a fire department emergency medical technician, regarding measures taken immediately preceding and during the employee's transport to the hospital; a position description for supervisory mine inspector; correspondence between the employee and John Rainwater, an attorney with the employing establishment's solicitor's office, regarding possible lawsuits filed against the employee by the operator of the Rattlesnake Pit mine who had been cited in the fatality

investigation; and proof that the employee secured a personal liability insurance policy for $1,000,000.00.[1]

By letter dated November 8, 2001, the Office requested that appellant submit additional evidence, including marriage and death certificates and information regarding the employee's health. In a separate letter, the employing establishment was asked to respond to the claim.

Appellant thereafter submitted evidence including a marriage certificate, which indicated that she and the employee married on May 19, 1964. His death certificate, signed by Dr. Kessler, provided an immediate cause of death of cardiopulmonary arrest with no consequential cause listed. In a letter dated November 28, 2001, appellant reiterated her previous contentions and advised that the employee had smoked one pack of cigarettes per day. She reported that she found him unresponsive at 3:15 a.m. on May 22, 2001 and immediately called 911. Appellant also submitted treatment notes from Dr. Kessler dating from January 27, 1998 to April 13, 2001, which chronicled the employee's treatment for a skin lesion on his neck, the flu, back pain and a kidney stone. A March 8, 2001 computerized tomography scan of the abdomen and pelvis demonstrated a kidney stone and lumbar disc disease and a March 8, 2001 lumbar spine x-ray demonstrated degenerative disease. She also submitted laboratory studies from March 8 and 21, 2001. The Boulder City Hospital emergency room report dated May 22, 2001, indicated that the employee was admitted at 3:45 a.m., unresponsive and without respirations. After emergent care was unsuccessful, he was pronounced dead at 4:06 a.m. by Dr. David Daitch, Board-certified in emergency medicine. The record establishes that an autopsy was not performed.

In an undated statement received at the Office on February 7, 2002, Irvin T. Hooker, district manager of the Rocky Mountain district, advised that the employee had been the field office supervisor for the Metal and Nonmetal Boulder City, Nevada field office where he supervised five mine inspectors for the southern section of Nevada. Mr. Hooker noted that prior to April 1, 2000 the Boulder City field office had been contained in the Western district and, after realignment in April 2001, was transferred to the Rocky Mountain district. He noted that field offices throughout the country did not have administrative support staff and stated that the employee's job duties encompassed the investigation of mine accidents, noting that he served as lead investigator of the Rattlesnake Pit mine facility. Mr. Hooker reported that the Rattlesnake Pit's owner was "anti-government" but that he was not aware of any threatening telephone calls or threatening actions made to the employee. He noted that the legal representative of the Rattlesnake Pit mine filed notices of fault and default against various individuals within the employing establishment, including the employee and that the employee was advised by the solicitor's office that he should not be overly concerned regarding this. Mr. Hooker stated that the Rocky Mountain district office was not aware that appellant had been trained in secretarial procedures and was volunteering at the Boulder City facility until an anonymous complaint was received. After it was discovered that she was working at the facility, the employee was immediately informed to stop the practice. Mr. Hooker stated that the employee was required to work an 8-hour day, 40-hour week and stated that he was unaware that the employee worked

[1] Appellant also submitted a Form CA-2, occupational disease claim, for the employee dated July 16, 2001 in which she reported that he first became aware of his condition and its relationship to his employment on May 22, 2001 the date of his death. The Office adjudicated the case as a death claim only.

additional hours. He advised that, as supervisor, the employee was responsible for disciplinary matters in the field office and concluded that in his last conversation with the employee, he stated that things were going well and did not request a downgrade.

The employing establishment also submitted copies of employee physical examinations including a preemployment physical and examinations done in 1995 and 1999. These provided a history that the employee had rotator cuff surgery in 1998. A May 8, 1995 electrocardiogram (ECG) was considered borderline, showing possible inferior ischemia. September 3, 1991 and June 22, 1999 ECGs were reported as normal. On June 28, 1995 Dr. John Holland, the examining physician, who is Board-certified in occupational medicine, advised that the employee could perform his regular duties. In a report dated August 16, 1995, Richard B. Rose, an employing establishment manager, advised that the employee should consult his physician regarding ECG and cholesterol findings. On June 24, 1999 Dr. Quincy A. Johnson, an osteopath,[2] advised that there were no limiting conditions for the employee's job.

By decision dated April 9, 2002 and finalized April 10, 2002, the Office denied the claim, finding that appellant failed to establish that the alleged factors arose in the performance of the employee's federal duties and that the medical evidence did not establish that his death was caused by his federal employment. On April 29, 2002 appellant requested a hearing. On September 22, 2002 she requested that subpoenas be issued for Linda Glowacki, Federal Protective Services and Jane Route, Mr. Hooker and Jake De Herrera of the employing establishment. By letter dated November 6, 2002, an Office hearing representative advised appellant that, as his subpoena power extended only 100 miles from the hearing location, he could only issue a subpoena for Ms. Glowacki. The record contains a subpoena issued to Ms. Glowacki that day. It was, however, returned to the Office.

In an undated statement received by the Office on December 20, 2002 appellant reiterated her contention that employment stress caused the employee's death and submitted copies of notices of suspension for John O'Brien and Robert Flowers, issued by the employee; evidence regarding the employee's liability insurance; a report of investigation of the Rattlesnake Pit mine dated April 21, 2000, which listed the employee as an investigator; her request for the employee's personnel records; the employee's earnings and leave statement for pay period 10, ending May 5, 2001; an April 1986 article from the journal *American Health* entitled "What's Your Stress Style"; a July 13, 1989 letter of recommendation regarding the employee; a copy of a request for resolution dated April 30, 2001, prepared by Mr. O'Brien and addressed the employee; and a May 5, 2001 memorandum from the employee to Mr. De Herrera, assistant district manager of the Rocky Mountain district, regarding Mr. O'Brien's request and investigation.

Appellant also submitted statements from her father, Nelson McBride, who advised that the employee would be interrupted by work-related telephone calls at all hours and worked long hours; from her son, Scott D. Harsh, who reported that he spoke with his father regarding the Rattlesnake Pit mine investigation and threats made and about his father's wish to return to mine inspection duties; from James B. Hudgins, a long-time friend who is retired from the employing establishment, who reported that the employing establishment told him about overwork, the

[2] Dr. Johnson's credentials could not be ascertained.

problems with his inspectors, the Rattlesnake Pit mine investigation, and his wish to return to inspection duties; from a friend, Stephen Wegner, who stated that he was aware that the employee worked weekends; and from Cathy Matchett, a former coemployee, who advised that an employing establishment manager had trained appellant in secretarial duties, that she was aware of the Rattlesnake Pit mine investigation and subsequent problems and that the employee tried to speak with her the day before his death.

At the hearing, held on December 20, 2002, appellant testified regarding the employee's employment history and reiterated her allegations regarding the cause of his death, noting that he would bring work home every night, that vacations were cancelled and that, when on vacation, he would constantly be on the telephone with the employing establishment. She stated that the employee's stress was also caused by conflicting and changing policies of the Denver district office, that he had trouble sleeping and requested to be returned to the inspector position. Appellant described the telephone threats made to her at home and discussed in detail the investigation into two inspectors at the Boulder City office. She stated that, on the day before the employee's death, he was told by the Denver office that he had to issue letters of warning to the inspectors or resign and at home that evening he prepared a letter of resignation which she proofread. Appellant explained that she was told that an autopsy could not be performed unless requested by the coroner. Her son, Donald, who works in law enforcement, testified regarding his conversations with his father regarding threats made during the Rattlesnake Pit mine investigation and noted that his father worked long hours, stating that he would accompany his father to the office on weekends.

By letter dated January 22, 2003, Mr. Hooker countered appellant's allegations, reiterating that it was improper for her to volunteer as a secretary, that there were no records that the employee worked long hours and that he was never denied annual leave. Mr. Hooker noted that accident investigations and report writing were part of the employee's supervisory duties. He stated that he had no knowledge of the employee's requests regarding the investigations of the supervisors or that the employee had submitted a letter of resignation. Mr. Hooker further stated that no letter of reprimand was to be served on the employee.

By decision dated May 8, 2003, an Office hearing representative modified the prior decision to show that the employee sustained two compensable factors of employment, that he worked prolonged hours and that threats were made against him regarding the investigation of the Rattlesnake Pit mine. The hearing representative, however, denied appellant's claim, finding that the medical evidence of record was insufficient to establish that the employee's death was due to the compensable employment factors.

On May 7, 2004 appellant, through her attorney, requested reconsideration and submitted additional medical evidence[3] including a surgical pathology report in which Dr. Gregory S. Ray, Board-certified in anatomic and clinical pathology, advised that a donor heart specimen No. 55809 revealed evidence of a past myocardial infarction involving the posterior left ventricle and severe atherosclerosis with narrowing of the right coronary artery to 10 percent of its original size, the left anterior descending to 20 percent of its original size and the left circumflex to 40

[3] Appellant also submitted duplicative and irrelevant medical evidence regarding a spinal fusion performed on the employee in 1986.

percent of its original size. The aortic valve and anterior mitral leaflet revealed moderate atherosclerotic plaque formation.

In a March 24, 2004 report, Dr. Irwin Hoffman, Board-certified in internal medicine and cardiovascular disease, advised that the employee's coronary arteries were not normal, with evidence of severe triple vessel coronary artery disease and an old myocardial infarction. He reviewed the employee's employing establishment physical examinations and noted the 1995 ECG findings of abnormalities, advising that, if this information had been relayed to the employee, his life would have been prolonged. Dr. Hoffman identified risk factors of smoking, dyslipemia and job-related stress, discussed the compensable factors of employment and concluded that "with reasonable medical certainty these job stresses accelerated [the employee's] coronary atherosclerosis, making him increasingly likely to sustain coronary disease complications, such as the ventricular fibrillation episode which caused his death."[4]

In response to an Office request, the employing establishment forwarded a copy of the 1995 employing establishment physical examination that was signed by the employee on May 8, 1995 and noted that a copy of all the examination components were forwarded to the employee's home.

The Office referred the case record to Dr. Barbara Connors, Board-certified in internal and occupational medicine, for review.[5] In a report dated May 12, 2004, Dr. Connors disagreed with Dr. Hoffman's conclusion that the employee's death was caused by employment factors. She noted the employee's smoking history, the cardiac pathology of coronary artery disease and opined that, upon her review, the 1995 ECG was essentially normal. Dr. Connors stated that smoking is an established cause of cardiac arrhythmias and advised that the employing establishment's medical records did not indicate that the employee had increased blood pressure, that his lipids were normal in 1999 and Dr. Kessler opined that the employee did not exhibit evidence of underlying heart disease. Dr. Connors noted that the employee was hospitalized in 1998 for a rotator cuff repair and opined that presurgical screening at that time should have included an ECG and blood work but that those records were not submitted for review. She stated that there was no medical documentation to support appellant's claim that the employee was under stress or that he sought any type of medical care for the alleged stress, noting that there was no evidence that the employee reported stress to Dr. Kessler, who opined that the employing establishment had no duty to inform the employee regarding his reports because a doctor/patient relationship did not exist. She, however, noted that the record indicated that these reports were forwarded to the employee.

In a decision dated July 9, 2004 and reissued on August 24, 2004, the Office denied modification of the prior decision, finding the medical evidence insufficient to establish that the employee's death was due to the two compensable factors of employment. On October 5, 2004 appellant, through her attorney, requested reconsideration, contending that the opinion of Dr. Hoffman was entitled to greater weight because he is Board-certified in cardiology whereas

[4] Dr. Hoffman also forwarded a copy of his curriculum vitae and articles he referenced in his report.

[5] Dr. Connors, an osteopathic physician, is Board-certified in internal medicine and occupational medicine, as noted by the American Board of Medical Specialists.

Dr. Connors is merely Board-certified in internal medicine. Appellant also submitted a report dated September 15, 2004 in which Dr. Hoffman disagreed with Dr. Connors' conclusions, opining that the employee's coronary artery disease was present in 1995 as evidenced by the ECG and blood work. He reiterated that the employee should have been informed about these abnormal findings.

By decision dated November 2, 2004, the Office denied modification of the prior decisions, finding that Dr. Hoffman did not provide a rationalized medical opinion explaining the relationship between the two accepted factors and the employee's death.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[6] provides that the United States shall pay compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[7] However, an award of compensation in a survivor's claim may not be based on surmise, conjecture or speculation or on appellant's belief that the employee's death was caused, precipitated or aggravated by his employment. The mere showing that the employee was receiving compensation for total disability at the time of death does not establish that the death was causally related to conditions resulting from the employment injury.[8]

A claimant has the burden of proving by the weight of the reliable, probative and substantial evidence that the employee's death was causally related to his or her employment. This burden includes the necessity of furnishing rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship.[9]

In the case of *Lillian Cutler*,[10] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable stress-related condition arising under the Act. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[11] When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the

[6] 5 U.S.C. §§ 8101-8193.

[7] 5 U.S.C. § 8102(a).

[8] *See Susanne W. Underwood* (*Randall L. Underwood*), 53 ECAB 139 (2001).

[9] *Lois E. Culver* (*Clair L. Culver*), 53 ECAB 412 (2002).

[10] 28 ECAB 125 (1976).

[11] *See Robert W. Johns*, 51 ECAB 137 (1999).

nature of the work.[12] To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.[13]

The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.[14] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the employee's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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.[15]

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary of Labor shall appoint a third physician, who shall make an examination.[16]

ANALYSIS

The Office accepted that the employee sustained two compensable factors of employment, that he worked prolonged hours and that threats were made against him regarding the investigation of the Rattlesnake Pit mine. The Board also finds that the employee's regular job duties of investigating fatalities and carrying out his supervisory duties, including investigating those employees he supervised, would be compensable.[17] The Board, however, finds that appellant submitted no probative evidence to indicate that the employee's vacations were cancelled or that he was told to reprimand his inspectors or he would receive a letter of warning.[18]

As appellant has established that the employee sustained compensable employment factors, the Office must base its decision on an analysis of the medical evidence.[19] Part of appellant's burden of proof is the submission of rationalized medical opinion evidence establishing a causal relationship between the compensable employment factors and the employee's death.[20] In analyzing the evidence of record, the Board finds that the weight of the

[12] *Lillian Cutler*, *supra* note 10.

[13] *Janice I. Moore*, 53 ECAB 777 (2002).

[14] *See Donna L. Mims*, 53 ECAB 730 (2002).

[15] *Claudio Vazquez*, 52 ECAB 496 (2001).

[16] 5 U.S.C. § 8123(a).

[17] *Lillian Cutler*, *supra* note 10.

[18] *Janice I. Moore*, *supra* note 13.

[19] *Janet L. Terry*, 53 ECAB 570 (2002).

[20] *Lois E. Culver (Clair L. Culver)*, *supra* note 9.

medical evidences rests with the opinion of the Office referral physician, Dr. Connors, regarding whether the employee's death was caused by the compensable factors of his federal employment.[21]

Dr. Kessler, the employee's attending osteopath stated that appellant's coronary arteries were reported to be clear at the time they were harvested. While the record also contains a pathology report regarding donor specimen number 55809, there is nothing to identify the surgical specimen as belonging to the employee. Dr. Hoffman advised that the employee's coronary arteries were not normal with evidence of severe triple vessel disease. He discussed the compensable factors found by the Office and concluded that, with a reasonable degree of medical certainly, the job stresses accelerated the employee's coronary condition, making him increasingly likely to sustain coronary complications such as the ventricular fibrillation episode, which caused his death. Dr. Hoffman, however, relied in part on the above-mentioned pathology report. Dr. Connors disagreed with Dr. Hoffman's conclusions and provided a well-reasoned report in which she noted that Dr. Kessler opined that the employee did not demonstrate evidence of heart disease. She stated that there was no medical documentation in the record to support that the employee sought any type of medical care for stress and concluded that smoking is an established cause of cardiac arrhythmias. As appellant did not provide sufficient medical evidence to establish that the employee's death was due to the compensable factors of employment, his death on May 22, 2001 is not compensable under the Act.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that the employee's death was caused by factors of his federal employment.

[21] *Claudio Vazquez, supra* note 15; *see Bailey Varnado, Jr.*, 53 ECAB 755 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 2 and August 24, 2004 be affirmed as modified.

Issued: October 3, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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