

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LOMA GAYLE FARRIS (LARRY R. FARRIS) and DEPARTMENT OF THE  
AIR FORCE, TINKER AIR FORCE BASE, OK

*Docket No. 99-124; Submitted on the Record;  
Issued May 10, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant has established that she is entitled to benefits under 5 U.S.C. § 8133.

In the present case, appellant filed a death benefits claim (Form CA-5) with respect to the death of her husband on April 13, 1995. By decision dated March 22, 1996, the Office of Workers' Compensation Programs denied the claim. The Office's Branch of Hearings and Review denied appellant's request for a hearing as untimely in a decision dated June 6, 1996. Following an appeal, the Board granted the Director's motion to remand the case on the grounds that the hearing request was timely.<sup>1</sup> By decision dated April 21, 1997, an Office hearing representative remanded the case for further development of the medical evidence.

In a decision dated May 19, 1997, the Office denied the claim on the grounds that the weight of the evidence established that, the employee's death was not causally related to his employment. This decision was affirmed by a hearing representative in a decision dated July 2, 1998.

The Board has reviewed the record and finds that there is a conflict in the medical evidence under 5 U.S.C. § 8123(a) and the case must be remanded to the Office for further development.

In the present case, it is appellant's contention that the employee's death on April 13, 1995 was causally related to the failure of the employing establishment's medical services clinic to properly diagnose and treat the employee on April 12, 1995. The Board has held that a claimant may establish that the employee's death was causally related to employment if the actions of employing establishment medical personnel in an emergency situation contributed to the employee's death. In *Mildred Drisdell (Bennie L. Drisdell)*, the Board adopted the "human

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<sup>1</sup> Docket No. 96-2147.

instincts” doctrine with respect to the actions of the employing establishment’s medical staff.<sup>2</sup> The Board cited a leading state court decision as to the standard of care required:

“[The employer’s] duty is to provide a doctor who will and does exercise in the diagnosis and treatment of the patient the degree of care, knowledge and skill ordinarily possessed and exercised in similar situations by the average number of the profession practicing in his field. If the doctor chosen fails to satisfy that standard and if, as a result that failure, the employee dies, the doctor is guilty of professional negligence or malpractice. Under such circumstances, the doctor’s negligence must be treated as a condition of employment.”<sup>3</sup>

The Director does not dispute that the Board has adopted the human instincts doctrine. It is the Director’s contention that the weight of the evidence does establish that the requisite standard of care was met in this case. The Board disagrees and finds that a conflict in the medical evidence exists and must be resolved by further development of the evidence.

In a report dated October 1, 1995, Dr. Jean Pitts, a specialist in cardiovascular disease, stated that the death of the employee on April 13, 1995 was due to cardiac tamponade secondary to rupture of an ascending aortic dissection into the pericardial sac. He opined:

“[T]he death of the employee was due to the deleterious effects of medical services furnished by the [o]ccupational [m]edical [s]ervices [OMS] [of the employing establishment] through error or agency failure to properly identify or diagnose the occurrence of an aortic dissection in progress and/or failure to recognize the existence of a life threatening emergency....

“The medical reasons for my opinion are: Despite the sudden onset of dramatic, unrelenting pain in this previously healthy individual, [the claimant] was never seen by the attending physician at the [o]ccupational [m]edical [s]ervices, nor was a history of his symptoms taken by the on-duty physician’s assistant. A physical examination appropriate for a patient presenting with pain radiating to the throat and back and hypotension was never performed by OMS personnel, a further omission to provide responsible care for [the employee].”

Dr. Pitts concluded that the findings of electrocardiograms performed on April 12, 1995 in a patient with the employee’s history would warrant safe transportation to a prompt admission to a cardiac care facility.

The Office referred the case record to an Office medical adviser for an opinion as to causal relationship between the employee’s death and treatment at the employing establishment health clinic. In a report dated May 15, 1997, the medical adviser opined:

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<sup>2</sup> 33 ECAB 409 (1982).

<sup>3</sup> *Id.* at 413, citing *Walck v. Johns-Manville Products Corp.*, 56 N.J. 533, 267 A.2d 523 (1970). The Board has also recognized a duty of reasonable care by coworkers in rendering assistance in a medical emergency situation; see *Jerry L. Sweeden*, 41 ECAB 721 (1990).

“In my opinion, the rapid 45[-]minute[s] service of the [o]ccupational [m]edical [s]ervices, the warning not to drive, the supervisor taking the claimant immediately to his local hospital (within 30 minutes), all point to a timely, proper, assessment and disposition of the claimant’s complaints. To presume that a diagnosis of a dissecting aortic aneurysm should have been made at this level of care, is, in my opinion, overstating reasonable expectations. The diagnosis of a [t]ype II aortic aneurysm is a difficult one at best. There is no record to indicate that the claimant ever developed the usual diagnostic findings that would be expected with a dissecting aneurysm, until just before his demise, *i.e.*, no aortic regurgitation, no loss of pulses, no hypotension, no widened superior mediastinum on chest x-ray, etc.”

Section 8123(a) of the Federal Employees’ Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>4</sup>

In this case, the Director argues that there is additional medical evidence that, combined with the Office medical advisers’ opinion, outweighs the opinion of Dr. Pitts. In a March 20, 1995 report, Dr. Darryl Fisher, a surgeon, opines that the “evaluation and referral of [the employee] met the requisite standard of care” for treatment by an outpatient facility for treatment of a patient presenting the facility with chest pain. He notes the events on April 12, 1995 but does not offer medical rationale for his opinion.

The record also contains a report dated December 8, 1995 from Dr. Wesley Mote, a specialist in occupational medicine who was the head of the employing establishment’s medical clinic. He reviewed the treatment provided to the employee and concluded that the claimant had received appropriate medical services. The Board notes that Dr. Pitts submitted a March 23, 1998 report, which specifically addresses the statements made by Dr. Mote and reiterates her opinion that the requisite standard of care was not met in this case.

It is well established that when there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>5</sup> The Board finds that Dr. Pitts has submitted well-rationalized medical reports in support of her opinion in this case. The evidence from the Office medical adviser also constitutes rationalized evidence that directly conflicts with Dr. Pitts. The additional evidence from Drs. Mote and Fischer is not of such probative value that it can be considered the weight of the evidence in this case. As noted above, Dr. Fischer did not provide an explanation for his opinion and Dr. Mote’s statements were specifically addressed by Dr. Pitts. Accordingly, the Board finds that an unresolved conflict in the medical evidence exists and the case must be remanded to the Office for proper resolution of the conflict. The Office should secure a reasoned medical opinion from an appropriate impartial medical specialist as to

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<sup>4</sup> *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

<sup>5</sup> *William C. Bush*, 40 ECAB 1064 (1989).

whether the employing establishment's medical staff failed to meet the requisite standard of care and if so, whether such failure contributed to the employee's death on April 13, 1995. After such further development as the Office deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated July 2, 1998 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
May 10, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member