U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter BEVERLY A. BARUSCH, claiming as widow of EDWARD BARUSCH and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Miami, FL

Docket No. 02-1760; Submitted on the Record;
Issued April 14, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the employees' death resulting from acute ventricular fibrillation due to hypertensive cardiovascular disease on August 6, 1998 was causally related to factors of his federal employment.

This is the second appeal in this case. On June 13, 2001 the Board set aside three decisions of the Office of Workers' Compensation Programs dated December 23, September 8 and July 21, 1999, which denied appellant survivor benefits.[1] The Board found that the conflict in medical opinion created between Dr. Kimber Ward, an attending physician and an Office medical adviser was not resolved by Dr. Paul Farrell, a Board-certified cardiologist, selected as the impartial medical specialist and remanded the case for the Office to refer the case to a new impartial medical specialist for resolution. The complete facts of this case is set forth in the Board's June 13, 2001 decision and are herein incorporated by reference.

On remand, the Office referred the case, along with the statement of accepted facts to Dr. Alan Schimmel, a Board-certified physician in cardiovascular disease selected as the new impartial medical specialist. In a report dated July 31, 2001, he reviewed the file and determined that appellant's mild hypertension diagnosed in 1970 would not be the cause of a heart attack and or primary arrhythmia or hypertensive cardiovascular diseases, since mild hypertension medically treated would not cause any adverse problems without a worsening of the condition or other outside factors. Dr. Schimmel stated that since the employee's employment factors ceased in 1972, when he stopped work, such factors did not cause a worsening of his mild hypertension. He pointed out the risk factors in his report for the development of coronary artery disease such as hyperlipidemia and atherosclerosis and his opinion that the employee's death was most likely due to the natural progression of atherosclerosis with those risk factors.

[1] Docket No. 00-1455 (issued June 13, 2001).

By decision dated August 13, 2001, the Office denied appellant's claim on the grounds that the weight of the medical evidence failed to establish that appellant's husband's employment-related injury caused his death.

In a letter dated August 17, 2001, appellant's counsel requested a review of the written record, contending that he wrote to the Office on June 18, 2001 and requested a copy of the Office's statement of accepted facts and the questions to the impartial medical specialist before the claim was sent to the impartial medical specialist. Appellant's counsel indicated that he sent a follow-up request on August 7, 2001 but received no response and further that he never received a copy of the Office's referral letter to Dr. Schimmel. He argued that Office regulations require that appellant's representative receive all copies of correspondence released in a claim where a representative has been appointed.

By decision dated May 7, 2002, the Office hearing representative affirmed the prior decision on the grounds that the weight of the medical evidence established that the employee's cardiac death did not result from employment factors.

The Board finds that appellant did not meet her burden of proof to establish that the employee's death on August 6, 1998 was causally related to the August 25, 1972 employment injury.

Appellant 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 employment injury.[2] This burden includes the necessity of furnishing rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship.[3]

In this case, a conflict in the medical evidence was created on whether the employee's death was due to his work injury. To resolve the conflict, the Office referred appellant to Dr. Schimmel, who acted as an impartial medical specialist. He noted that appellant had mild hypertension diagnosed in 1970, but that this condition when medically treated should not cause adverse problems without a worsening of the condition or outside factors. Dr. Schimmel, therefore, concluded that since the employee's work factors ceased in 1972, when he stopped work, such factors did not cause a worsening of his mild hypertension or cause his cardiac death. In situations when there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[4] In this case, Dr. Schimmel's impartial medical examination report dated July 31, 2001 was well rationalized and based upon a proper factual background of the case. He concluded with sound medical reasoning that the employee's death on August 6, 1998 was not causally related to the August 25, 1972 employment injury. Dr. Schimmel's report, therefore, is entitled to special weight and, in the context of this case,

[2] *Carolyn P. Spiewak* (*Paul Spiewak*), 40 ECAB 552, 560 (1989).

[3] *Martha A. Whitson* (*Joe E. Whitson*), 43 ECAB 1176, 1180 (1992).

[4] *James P. Roberts*, 31 ECAB 1010 (1980).

constitutes the weight of the medical evidence. The weight of the medical evidence shows that the employee's condition at the time of his death could not be directly connected to the 1972 employment injury for which appellant sought compensation. Appellant, therefore, has not met her burden of proof.

The Board notes that on appeal, counsel for appellant argues that the Office's failure to notify the representative of a referral of the case for an impartial examination effectively denied appellant the statutory right to have a physician designated and paid by her present to participate in the examination. He argues that this denial precluded the Office from relying on the report of the impartial medical specialist to deny appellant's claim for survivor benefits. For the reasons stated below, the Board disagrees.

In the case of *Henry J. Smith, Jr.*,[5] the Board held that when the Office does not notify a claimant of a physician's status as impartial medical specialist, that physician may not serve as the impartial medical specialist in that case. The Office's procedures, as noted in the *Smith* decision, are intended to assure a claimant's knowledge that a physician is an impartial medical specialist, so that he or she may then choose to exercise the procedural right to participate in the selection of the impartial medical specialist.[6] The Board indicated, however, that actual notification of an impartial medical examination may be based on a finding of a conflict by the Board.

The Board notes that appellant and her legal representative were put on notice that a new impartial medical specialist was to be selected based on receipt of the Board's June 13, 2001 remand decision. Appellant's counsel did not specifically make a request to participate in the selection of the impartial medical specialist. In a letter dated June 18, 2001, appellant's attorney simply requested a copy of the statement of accepted facts, questions to the impartial medical specialist and the Office referral letter to the impartial medical specialist before the claim was sent to a specialist. This letter was date-stamped as received on August 13, 2001, the day the Office denied appellant's claim for death benefits.

Appellant's representative did not state at any time that he wished to participate in the selection of the impartial medical specialist or otherwise raise a specific objection to Dr. Schimmel's selection. Any error committed by the Office in failing to copy appellant's counsel on the letter scheduling the impartial medical examination with Dr. Schimmel is deemed harmless.[7]

[5] 43 ECAB 524 (1992), *reaff'd on recon.*, 43 ECAB 892 (1992).

[6] *See Delmom R. Rumsey*, 37 ECAB 645 (1986).

[7] *See Irene Williams*, 47 ECAB 619 (1996).

The decisions of the Office of Workers' Compensation Programs dated May 7, 2002 and August 13, 2001 are affirmed.

Dated, Washington, DC
April 14, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member