U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WANDA A. RASCH, claiming as widow of ROBERT R. RASCH and
DEPARTMENT OF THE ARMY, HEALTH SERVICES COMMAND,
Fort Bragg, NC

Docket No. 02-2351; Submitted on the Record;
Issued June 4, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

This is the fourth appeal in the present case. In the third appeal,[1] the Board had issued a decision and order on February 2, 2001, in which it set aside the August 10, 1998 and January 4, 1999 decisions, of the Office and remanded the case to the Office for further development of the medical evidence.[2] The Board found that there was a conflict in the medical evidence between Dr. Peter G. Pappas, a Board-certified internist specializing in infectious diseases who served as an Office referral physician, and Dr. Woodhall Stopford, an attending physician Board-certified in internal and preventive medicine and specializing in occupational medicine, regarding whether the October 11, 1990 employment incident caused, hastened, precipitated or contributed to the employee's death on October 19, 1990.[3] The Board determined that the case should be referred to an impartial medical specialist to resolve this conflict in the medical opinion evidence. The Board directed the Office to refer the case file and the statement of accepted facts to an

[1] Docket 99-1251.

[2] On October 19, 1990 the employee, then a 34-year-old medical supplies worker, passed away. The death certificate listed "viral syndrome" as the immediate cause of death. On October 19, 1990 appellant the employee's widow, filed a claim on behalf of the employee's survivors stating that, while the employee was changing an expired nerve agent antidote (atrophine) on October 11, 1990 the autoinjector went off and penetrated his right index finger. The Office later accepted the condition of "puncture would of the right index finger," but denied the claim that the employee's death was caused by the October 11, 1990 employment injury.

[3] In a report dated August 6, 1998, Dr. Pappas determined that it was unlikely that the October 11, 1990 employment incident contributed to employee's death on October 19, 1990. In a report dated November 9, 1998, Dr. Woodhall Stopford, determined that it was likely that the October 11, 1990 employment incident contributed to the employee's death on October 19, 1990.

appropriate specialist for an impartial medical evaluation and opinion on this matter to be followed by an appropriate decision.[4] The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand the Office referred the case file and the statement of accepted facts to Dr. Omar Kawwaff, a Board-certified internist specializing in infectious disease, for an impartial medical examination and opinion regarding whether the October 11, 1990 employment incident caused, hastened, precipitated or contributed to the employee's death on October 19, 1990. In a report dated July 22, 2001, Dr. Kawwaff determined that is was unlikely that the October 11, 1990 employment incident caused, hastened, precipitated or contributed to the employee's death on October 19, 1990. He noted that it was likely that the employee died of an acute myocarditis and thrombocytopenia of a viral nature. He indicated, however, that there was no clear evidence that such a potential process was related to the pricking of the employee's finger on October 19, 1990. Dr. Kawwaff stated that there was no clinical evidence on initial hospital admission or autopsy to support such an employment-related connection. He indicated that it would have been helpful to have the needle, which pricked the employee's finger available for testing.

By decision dated August 7, 2001, the Office found that the medical evidence did not show that the October 11, 1990 employment incident caused, hastened, precipitated or contributed to the employee's death on October 19, 1990. The Office determined that the weight of the medical evidence on this matter rested with the well-rationalized opinion of Dr. Kawwaff. On August 6, 2002 appellant requested reconsideration of the Office's August 7, 2001 decision and submitted numerous documents in support of this request. By decision dated September 12, 2002, the Office denied her request for merit review.

The Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

The only decision before the Board on this appeal is the Office's September 12, 2002 decision denying appellant's request for a review on the merits of its August 7, 2001 decision. Because more than one year has elapsed between the issuance of the Office's August 7, 2001 decision and September 23, 2002, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the August 7, 2001 decision.[5]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[6] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a

[4] In connection with a prior appeal, the Board directed the Office to obtain further factual evidence regarding the circumstances of the October 11, 1990 employment incident. As a result, it was determined that the actual needle, which pricked appellant's finger on October 11, 1990 could not be recovered or otherwise analyzed. The employee had been partially embalmed prior to the performance of an autopsy.

[5] *See* 20 C.F.R. § 501.3(d)(2).

[6] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[7] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[8] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[9]

In support of her reconsideration request, appellant submitted photocopies of numerous documents. Virtually, all of these documents had been previously submitted to the Office and considered by the Office in its prior decisions.[10] The submission of this evidence would not require reopening of appellant's claim as the Board has held that the submission of evidence, which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[11]

In support of her reconsideration request, appellant also submitted an October 3, 2001 affidavit of Dr. Kawwaff, a Board-certified internist specializing in infectious disease, who served as an impartial medical specialist.[12] In his October 3, 2001 affidavit, Dr. Kawwaff testified, in response to questions by appellant's attorney, that testing the needle that pricked the employee's finger on October 11, 1990 and performing an autopsy prior to embalming would have helped to discern the cause of the employee's death. Appellant's attorney presented Dr. Kawwaff with a hypothetical case, in which it was assumed that the needle which pricked the employee was contaminated with some type of pathogen. In response to this line of questioning, Dr. Kawwaff stated, "If a contaminated needle caused an infection, it may have caused his death."

The Board notes that this affidavit would not require reopening of appellant's claim in that it is not relevant to the merit issue of the present claim, *i.e.*, whether the October 11, 1990 employment incident caused, hastened, precipitated or contributed to the employee's death on October 19, 1990. The Board has held that the submission of evidence, which does not address the particular issue involved does not constitute a basis for reopening a case.[13] Dr. Kawwaff merely responded to a hypothetical question posed by appellant's attorney and provided a speculative comment regarding the cause of the employee's death. His October 3, 2001 affidavit

[7] 20 C.F.R. §§ 10.606(b)(2).

[8] 20 C.F.R. § 10.607(a).

[9] 20 C.F.R. § 10.608(b).

[10] It appears that appellant may have resubmitted virtually the entire case record as it existed up to that point.

[11] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[12] As previously noted, the Office, in its August 7, 2001 decision, had found that the weight of the medical evidence, represented by the July 22, 2001 impartial medical report of Dr. Kawwaff, did not show that the October 11, 1990 employment incident caused, hastened, precipitated or contributed to the employee's death on October 19, 1990.

[13] *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

did not provide a clear opinion that appellant's death was related to the October 11, 1990 employment incident.[14]

Appellant also submitted a July 28, 2002 document, in which her attorney argued that the October 11, 1990 employment incident caused, hastened, precipitated or contributed to the employee's death on October 19, 1990. Appellant's attorney argued that the medical evidence showed such a relationship between the employee's death and the October 11, 1990 incident; that the Office failed to properly develop the evidence; that the absence of the needle which pricked the employee's finger prejudiced the case; that the employing establishment was negligent in allowing the employee to prick his finger with a contaminated needle; and that the sequence of events and symptoms suffered by the employee showed an employment-related cause of death.[15] The Board notes, however, that appellant has already made the same or similar arguments on several other occasions. The Office has previously considered and rejected these arguments.

In the present case, appellant has not established that the Office improperly refused to reopen her claim for a review on the merits of its August 7, 2001 decision, under section 8128(a) of the Act, because she did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.

[14] Moreover, the testimony contained in Dr. Kawwaff's October3, 2001 affidavit is similar to the commentary contained in a portion of his July 22, 2001 report.

[15] The document contains cites to federal court cases concerning the doctrine of *res ipsa loquitur*, but the law of other jurisdictions would not be directly relevant to the case at hand.

The September 12, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.[16]

Dated, Washington, DC
June 4, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[16] It should be noted that pages 1482 through 1535 of the record contain documents concerning an unrelated Office compensation claim of an Eddie Montgomery.