United States Department of Labor
Employees' Compensation Appeals Board

DIANE McCAMMON, Appellant (Widow of JESSE JAMES McCAMMON)	)	
and	)	**Docket No. 03-961** **Issued: January 20, 2004**
UNITED STATES POSTAL SERVICE, Post Office, Sullivan, IN, Employer	)	

Appearances:
Michael Rader, M.D., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On March 1, 2003 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated May 2, 2002, in which the Office refused to reopen his claim for further merit review; and February 25, 2003, in which the Office found that appellant's request for reconsideration was not timely filed and did not present clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over this case.

ISSUE

The issues are: (1) whether the Office properly refused to reopen appellant's claim for merit review on May 2, 2002 under 5 U.S.C. § 8128(a); and (2) whether the Office properly found on February 25, 2003 that appellant's request for reconsideration was not timely filed and did not present clear evidence of error.

FACTUAL HISTORY

On June 8, 2001 appellant submitted a claim for compensation by widow, Form CA-5, alleging that her husband's May 5, 2001 death was causally related to his employment. The employee, then a 56-year-old substitute rural carrier, was found deceased in his vehicle which was parked, with the engine still running, in a grassy area off the road along his route. The employee had the mail for the next delivery in his hand. In support of her claim, appellant submitted a death certificate signed by Dr. J. Danny Holmes, the coroner, who noted the cause of death as an acute myocardial infarction and did not list any contributing causes of death. The coroner further noted that the time of death was 2:30 p.m., and that no autopsy was performed.

In further support of her claim, appellant submitted a May 24, 2001 attending physician's report from Dr. Gene A. Bourgasser, the employee's treating Board-certified family practitioner. He noted that, on the day of his death, the employee was driving his mail route when he had a flat tire. The employee changed the tire and proceeded on his route, but shortly thereafter was found deceased in his vehicle alongside the road. Dr. Bourgasser noted that the coroner had listed the cause of death as an acute myocardial infarction and noted that the employee's death was apparently instantaneous, as he still had the mail for his next stop in his hand. He further indicated that the exertion to change the tire and complete the route contributed to and precipitated the employee's heart attack. Dr. Bourgasser explained that the employee had no prior complaints or symptoms, that a patron who talked with the employee as he started changing the tire noted no problems and that the employee apparently died within 15 minutes following that encounter. In an August 13, 2001 supplemental report, submitted in response to a request by the Office, Dr. Bourgasser stated that appellant had a history of hypertension and stroke in 1997 from which he had recovered, explained how physical exertion can precipitate a heart attack and concluded that "[c]hanging a tire of a car in hot weather would certainly increase the workload on the heart and its oxygen demand and could precipitate a heart attack."

On October 30, 2001 the Office referred a copy of the medical records and a statement of accepted facts, to Dr. Charles V. Mattingly, a Board-certified internist, for a second opinion. In a report dated November 13, 2001, he noted that as no autopsy had been performed, the employee could have died from a stroke or aneurysm or any other acute medical problem. Dr. Mattingly further stated that the major risk factors for heart attack included increasing age, family history, hypertension and smoking, that neither stress nor work activity represented a cause of coronary artery disease or heart attack and that, in this case, there was no proof that the employee even suffered a heart attack. He concluded that a heart attack was not a direct and proximate result of the employee's employment.

In a decision dated December 19, 2001, the Office rejected appellant's claim on the basis that she failed to establish that her husband's death was causally related to his employment. On January 25, 2002 appellant requested reconsideration of the Office's prior decision, but did not submit any new evidence or arguments in support of her request. In a decision dated May 2, 2002, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

On January 28, 2003 appellant renewed her request for reconsideration and submitted a January 15, 2003 medical report from Dr. Thomas F. Orman, a Board-certified internist, in support of her request.[1] Dr. Orman stated that he had reviewed the reports from Drs. Bourgasser and Mattingly and concluded:

> "In my opinion, the cause of [the employee's] death is more likely than not related to a cardiac arrhythmia or an acute myocardial infarction. According to Dr. Bourgasser's letter, he developed chest pain and shortness of breath shortly after changing a tire while working … he was found with mail in his hand indicating that the death process was quite short in duration.
>
> "[The employee] had a history of hypertension and diabetes, which Dr. Mattingly agreed are major risk factors in the development of coronary artery disease. Heavy physical exertion is a known trigger factor of a myocardial infarction.
>
> "In summary, I feel that it is more likely than not that [the employee's] death occurred as a result of changing the tire which triggered a myocardial infarction and probably a fatal cardiac arrhythmia."

In a decision dated February 25, 2003, the Office found that appellant's request for reconsideration was not timely filed and did not present clear evidence of error.

LEGAL PRECEDENT - Issue 1

Section 10.606 of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[2] Section 10.608 provides that, when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.

ANALYSIS - Issue 1

In her letter requesting reconsideration, appellant stated only that she would submit additional medical evidence to support her claim and did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2). In addition, while her request for reconsideration stated that new evidence supporting her claim would be submitted, no medical or factual evidence was received prior to

[1] Dr. Orman has a sub-specialty in cardiovascular disease.

[2] 20 C.F.R. § 10.606(b).

the issuance of the Office's May 2, 2002 decision. Consequently, appellant is not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(2).

As appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

CONCLUSION – Issue 1

The Board finds that, as appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office properly refused to reopen appellant's claim for review of the merits on May 2, 2002.

LEGAL PRECEDENT - Issue 2

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[3] The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.[4] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that its final merit decision was in error.[5]

ANALYSIS - Issue 2

The Board finds that, since more than one year had elapsed since the date of issuance of the Office's December 19, 2001 merit decision to the date that appellant's request for reconsideration was filed, January 24, 2003, her request for reconsideration was untimely. Moreover, the Board further finds that the evidence submitted by appellant in support of her request does not raise a substantial question as to the correctness of the Office's December 19, 2001 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of her claim. In this regard, appellant submitted a January 15, 2003 medical report from Dr. Orman. As noted above, he opined that, in his opinion, the employee's death was "more likely than not related to a cardiac arrhythmia or an acute myocardial infarction." In support of his conclusion, he noted that, according to Dr. Bourgasser, the employee developed chest pain and shortness of breath shortly after changing a tire while working. The Board notes, however, that the record does not contain any reports from Dr. Bourgasser which establish that the employee had developed symptoms prior to his demise. Rather, Dr. Bourgasser specifically stated that the employee had exhibited no prior complaints or symptoms and a patron who talked with the employee while he was changing the

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.138(b)(2); *see also Claudio Vazquez*, 52 ECAB 496 (2001).

[5] *See Gladys Mercado*, 52 ECAB 255 (2001).

tire noted no problems. In addition, Dr. Orman stated that the employee had a history of hypertension and diabetes, which are major risk factors in the development of coronary artery disease. Again, while the record supports that the employee had a history of high blood pressure, there is no indication that he had a history of diabetes. It is well established that medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of little probative value.[6] In addition, Dr. Orman's opinion that the employee's death "more likely than not" occurred as a result of changing the tire which triggered a myocardial infarction and probably a fatal cardiac arrhythmia, is speculative, especially in light of the fact that no autopsy was performed to determine the cause of death and appellant had a prior history of stroke in 1997. The Board has held that medical opinions which are speculative or equivocal in character have little probative value.[7] As Dr. Orman's opinion is both speculative and based on an inaccurate medical and factual history, his report is of little probative value and is insufficient to raise a substantial question as to the correctness of the Office's December 19, 2001 decision.

CONCLUSION – Issue 2

As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's December 19, 2001 decision, she has failed to establish clear evidence of error and the Office properly denied a merit review of her claim.

[6] *Douglas M. McQuaid*, 52 ECAB 382 (2001).

[7] *Frank Luis Rembisz*, 52 ECAB 147 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 25, 2003 and May 2, 2002 are affirmed.

Issued: January 20, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member