United States Department of Labor
Employees' Compensation Appeals Board

RUTH A. GILMORE, claiming as widow of ANTHONY GILMORE, Appellant	)	
and	)	**Docket No. 04-845**
	)	**Issued: October 21, 2004**
SMITHSONIAN INSTITUTION, NATIONAL ZOOLOGICAL PARK, Washington, DC, Employer	)	

Appearances:
Ruth A. Gilmore, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 11, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated November 12, 2003, which denied her reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the last merit decision dated November 8, 2001 and the filing of this appeal on February 11, 2004 the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. On appeal appellant alleged that the Office "made a mistake in [its] initial finding and they have never corrected that mistake." She asserted that the accepted April 3, 1973 lumbar injury caused "continuous deterioration, constriction, destruction of [the deceased employee's] body,"

rendering him unable to "exercise when he became a diabetic," ultimately resulting in sepsis, respiratory failure and death.

FACTUAL HISTORY

The Office accepted that, on April 4, 1973, the employee, then a 43-year-old animal keeper, sustained a lumbosacral strain necessitating a L4-5 lumbar laminectomy and discetomy on April 25, 1973. The employee received compensation for total disability beginning approximately July 26, 1973. He did not return to work.

The Office later accepted headaches and a functional overlay. The acceptance of the functional overlay was predicated on the April 30, 1986 report of Dr. John A. Kniepp, a Board-certified psychiatrist and neurologist, who performed a second opinion examination. He explained that the physical sequela of the accepted lumbar injury and surgery caused the employee to develop psychiatric symptoms and dysfunction. Dr. Harvey Ammerman, an attending Board-certified orthopedic surgeon, submitted July 10, 1989 and February 28, 1990 notes diagnosing headaches and diminished lower extremity reflexes. He also observed personality changes and ordered testing which revealed brain atrophy. In February 1996, the employee was admitted to a nursing home. Dr. Bruce J. Ammerman, an attending Board-certified orthopedic surgeon, diagnosed arachnoiditis, lumbar spondylosis and lumbar disc disease which markedly diminished the employee's ability to perform activities of daily living. The employee had also developed diabetes mellitus, coronary artery insufficiency, renal failure, brain atrophy, memory loss, hearing loss, hypertension and spinal stenosis. He sustained a heart attack and underwent a February 25, 1997 thrombectomy.

The employee died on July 28, 1997. The death certificate noted the immediate cause of death as respiratory arrest due to sepsis. Other significant conditions contributing to the employee's death were listed as end stage renal disease, coronary artery disease, diabetes mellitus, hypertension and spinal stenosis.

On September 29, 1997 appellant filed a claim for survivor's benefits, asserting that the employee's death was caused by the accepted April 4, 1973 lumbar injury and its sequela. She submitted a September 29, 1997 form report from Dr. Bruce Ammerman, who found that cervical and lumbar stenosis caused the employee to become immobile, contributing to the sepsis that caused his death. The Office obtained a second medical opinion from Dr. Robert E. Collins, a Board-certified orthopedic surgeon, finding that the employee's death from respiratory failure and sepsis was not causally related to the accepted lumbar injury.

The Office found a conflict of medical opinion between Dr. Bruce Ammerman, for appellant, and Dr. Collins, for the government. To resolve this conflict, the Office selected Dr. Vincent G. Desiderio, a Board-certified orthopedic surgeon, as the impartial medical examiner. In a May 27, 1998 report, he reviewed the medical record and explained that the accepted lumbar strain and laminectomy had no pathophysiologic relationship to the development of the sepsis-induced respiratory failure that resulted in the employee's death. He stated that there was "no direct cause of kidney failure and sepsis with regard to a lower back problem of many years ago." Dr. Desiderio noted that, while immobility would be an issue in treating a pulmonary condition, which the employee apparently did not have, the employee's

"primary cause of death was related to his kidneys and there is no direct relationship between back problems and kidneys."

Appellant thereafter submitted a September 29, 1998 report from Dr. Thomas Obisesan, an attending Board-certified family practitioner. He opined that, coupled with the employee's other medical problems, the accepted back injury contributed to the his functional decline, facilitating the "subsequent progression to dependency and death."

By decision dated December 4, 1998, the Office denied appellant's claim for death benefits on the grounds that she did not establish a causal relationship between the employee's death and the accepted April 4, 1973 lumbar injury, laminectomy, headaches and functional overlay.

In a December 2, 1999 letter, appellant requested reconsideration. She asserted that the accepted lumbar injury so debilitated the employee that he could not perform prescribed exercises to control his diabetes mellitus, leading to renal failure, sepsis and death. Appellant submitted test results, hospital and nursing home chart notes from 1996 and 1997. February 1997 reports diagnosed congestive heart failure and anemia. Dr. Yudh V. Gupta, an attending Board-certified internist, noted in an October 27, 1997 report that, at the time of the employee's death, he was hemodialysis-dependent due to end stage renal disease, with diagnoses of diabetes, depression, a history of spinal stenosis and status post cardiac catheterization. The employee also developed colitis in early July 1997.

By decision dated April 4, 2000, the Office denied modification on the grounds that the evidence submitted was insufficiently rationalized to outweigh the reports of Dr. Desiderio.

In a March 24, 2001 letter, appellant again requested reconsideration. She submitted a November 11, 1995 report from Dr. Mark N. Ozer, an attending Board-certified neurologist, diagnosing hypertension, congestive heart failure, diabetes, renal failure with hemodialysis dependency, low back pain and a right-sided cerebrovascular accident producing left-sided hemiparesis. In a September 25, 1997 report, Dr. Bruce Ammerman stated that "[a]bsent the spinal stenosis, it is unlikely [the employee] would have been bedridden, which appears to have contributed to his eventual demise." He explained, in a September 17, 1998 report, that employee's lack of mobility "contributed to his sepsis and ultimate demise."[1] Appellant also submitted a September 10, 1999 report from Dr. Obisesan, opining that the accepted back injury, "superimposed on his other medical conditions resulted in progressive sarcopenia and weakness that contributed" to his overall decline. The physician asserted that it was "highly likely" that the lumbar injury and inability to engage in activities of daily living contributed to his demise.

By decision dated November 8, 2001, the Office denied modification of its prior decisions. The Office found that the medical evidence submitted was insufficiently rationalized to outweigh Dr. Desiderio's opinion.

[1] September 1986 and March 1997 imaging studies showed spinal stenosis from L4-S1. Appellant also submitted test results from a 1994 left foot infection and the Office's September 1996 authorization for a medical wheelchair transport service to take the employee to and from appointments related to his accepted back condition. She also submitted copies of evidence previously of record.

In a February 25, 2002 letter, appellant requested reconsideration through her attorney.[2] She submitted copies of medical evidence previously of record.

By nonmerit decision dated September 20, 2002, the Office denied appellant's request for reconsideration on the grounds that she had not submitted new, relevant evidence or raised a substantial legal question.

In an April 7, 2003 letter, appellant again requested reconsideration. She asserted that the employee's death from sepsis and respiratory failure was precipitated by the debilitating effects of the accepted lumbar injury. Appellant submitted medical evidence. In a June 16, 1977 report, Dr. Spiridan Kouloris, an attending neurosurgeon, diagnosed "[s]ignificant residuals of lumbar spine injury" and lumbar disc disease. Dr. Kouloris found the employee totally and permanently disabled for work. In a July 16, 1980 report, from Dr. Stephen A. Smith, a Board-certified orthopedic surgeon, observed that the employee's complaints of lumbar and lower extremity pain and weakness were incompatible with objective clinical findings. Dr. Smith opined that, while the employee did exhibit residuals of the accepted lumbar injury and laminectomy, his symptoms of incapacitation were of psychiatric origin. He found appellant totally and permanently disabled due to a combination of physical and psychiatric difficulties. In a July 13, 1983 report, Dr. James W. Watts, a Board-certified neurosurgeon, opined that the employee's complaints of lumbar and lower extremity pain and weakness were not due to degenerative lumbar disc disease. In an August 27, 1992 chart note, Dr. Harvey Ammerman ordered a computed tomography (CT) scan of the employee's brain to ascertain if there were any gray or white matter changes. Appellant also submitted copies of Dr. Kniepp's April 30, 1986 report, Dr. Harvey Ammerman's July 10, 1989 and February 28, 1990 chart notes and Dr. Bruce Ammerman's September 29, 1997 report.

By decision dated November 12, 2003, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error. The Office noted that appellant's April 7, 2003 statement and the medical evidence submitted in support of her request were duplicative of evidence previously of record and did not clearly establish that the Office's November 8, 2001 decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] The Office, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of

[2] Appellant also requested reconsideration through her representative in a June 27, 2002 letter.

[3] 5 U.S.C. § 8128(a).

[4] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[5] *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

that decision.[6] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[7]

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulation.[8] Office regulation states that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[14] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.[15] The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[16]

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[6] 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[7] 5 U.S.C. § 10.607(b); *Thankamma Mathews, supra* note 4 at 769; *Jesus D. Sanchez, supra* note 6 at 967.

[8] *Thankamma Mathews, supra* note 4 at 770.

[9] 20 C.F.R. § 10.607(b).

[10] *Thankamma Mathews, supra* note 4 at 770.

[11] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[12] *Jesus D. Sanchez, supra* note 5 at 968.

[13] *Leona N. Travis, supra* note 11.

[14] *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[15] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[16] *Gregory Griffin, supra* note 6.

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on November 8, 2001. Appellant's April 7, 2003 letter requesting reconsideration was submitted more than one year after the last merit decision of record. Thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.[17]

It must now be determined whether appellant's April 7, 2003 request for reconsideration demonstrated clear evidence of error in the Office's November 8, 2001 decision, finding that she did not establish that the employee's death was causally related to the accepted lumbar injury, lumbar laminectomy, headaches and functional overlay.[18] Accompanying her April 7, 2003 request for reconsideration, appellant submitted several reports which do not address the issue of causal relationship between the accepted conditions and the employee's death. In a June 16, 1977 report, Dr. Kouloris, an attending neurosurgeon, found the employee permanently and totally disabled for work due to residuals of the accepted 1973 lumbar injury. The July 16, 1980 report from Dr. Smith, a Board-certified orthopedic surgeon, the July 13, 1983 report from Dr. Watts, a Board-certified neurosurgeon, and the April 30, 1986 report from Dr. Kniepp, a Board-certified psychiatrist, neurologist and second opinion physician, address the development of a psychiatric functional overlay. Dr. Harvey Ammerman, an attending Board-certified orthopedic surgeon, submitted July 10, 1989, February 28, 1990 and August 27, 1992 notes diagnosing headaches, diminished lower extremity reflexes and personality changes. As these reports do not address the critical issue of causal relationship, they are insufficient to *prima facie* shift the weight of the medical evidence in appellant's favor. These reports fail to raise a substantial question as to the correctness of the Office's November 12, 2003 decision denying appellant's request for reconsideration.[19]

Appellant also submitted a September 29, 1997 form report from Dr. Bruce Ammerman, an attending Board-certified orthopedic surgeon. He opined that the 1973 lumbar injury caused cervical and lumbar stenosis leading to the employee's immobility, resulting in sepsis and death. The Board notes that Dr. Bruce Ammerman was on one side of the conflict in medical opinion resolved by Dr. Desiderio, a Board-certified orthopedic surgeon, selected as the impartial medical examiner. In a May 27, 1998 report, Dr. Desiderio found that there was no pathophysiologic causal relationship between the employee's lumbar injury and the renal failure that caused the sepsis and respiratory arrest leading to his death. The Office determined that Dr. Desiderio's opinion as the impartial medical examiner was entitled to special weight in this case as it was sufficiently rationalized and based upon a complete and accurate factual and medical background.[20] Dr. Bruce Ammerman's opinion was previously considered by the Office

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[17] *Veletta C. Coleman*, 48 ECAB 367 (1997); *Gregory Griffin*, *supra* note 6; 20 C.F.R. §§ 10.607; 10.608(b).

[18] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001) (where the Board held that in a claim for death benefits, 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 federal employment).

[19] *Thankamma Matthews*, *supra* note 4.

[20] *Jacqueline Brasch (Ronald Brasch)*, *supra* note 18.

giving rise to the conflict of medical opinion resolved by Dr. Desiderio. It is insufficient to *prima facie* shift the weight of the medical evidence in appellant's favor. Dr. Bruce Ammerman's September 29, 1997 report fails to raise a substantial question as to the correctness of the Office's November 8, 2001 denial of reconsideration.

Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of her application for review do not raise a substantial question as to the correctness of the Office's November 8, 2001 decision and are thus, insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that appellant's untimely request for reconsideration failed to show clear evidence of error in the Office's November 8, 2001 decision, the last merit decision in the case. Therefore, the November 12, 2003 decision of the Office denying appellant's request for reconsideration was proper under the law and the facts of this case.

ORDER

IT IS HEREBY ORDERED THAT the November 12, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 21, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member