

**United States Department of Labor
Employees' Compensation Appeals Board**

JOSEPHINE JARSKI claiming as widow of STEVE J. JARSKI, Appellant)	
)	
and)	Docket No. 05-1303
)	Issued: December 9, 2005
)	
U.S. POSTAL SERVICE, POST OFFICE, Gaylord, MI, Employer)	
)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Daniel J. Bebble, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 27, 2005 appellant filed a timely appeal from the February 28, 2005 nonmerit decision of the Office of Workers' Compensation Programs' denying her request for reconsideration. Because more than one year has passed between the Office's last merit decision of February 9, 2004 and the filing of this appeal on May 27, 2005 the Board does not have 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 refused to reopen appellant's claim for further merit review under 5 U.S.C. § 8128(a). On appeal, appellant's attorney argued that the Office did not apply the correct legal standard in denying benefits and wrongfully interpreted the report of Dr. Kravitz, the impartial medical evaluator.

FACTUAL HISTORY

The Office accepted that on February 8, 1977 the employee, then a 59-year-old distribution clerk, sustained a precipitation of a myocardial infarction while in the performance of his duties. The employee stopped work that day and received compensation for total disability through the date of his death on May 27, 2003. The death certificate noted the immediate cause of death as a cerebrovascular accident, retroperitoneal abscess VS bleeding and diabetes mellitus.

On June 30, 2003 appellant filed a claim for survivor's benefits, asserting that the employee's death was caused by the February 8, 1977 injury accepted for a work-related precipitation of myocardial infarction. She submitted a copy of a May 20, 2003 report from Dr. Roy Boyer, a Board-certified internist specializing in noninvasive cardiology. Dr. Boyer noted that the employee was hospitalized May 10 to 13, 2003 and provided a final diagnosis of: cerebrovascular accident; underlying coronary artery disease; congestive heart failure; hypertension; hypercholesterolemia; osteoarthritis; chronic obstructive pulmonary disease; gastroesophageal reflux disease with hiatal hernia; and spinal stenosis by previous history. Within the report, Dr. Boyer noted that Dr. Susan Anderson, a neurologist, had suggested that maybe a large shower of blood clots had come from the employee's heart because of his previously noted congestive heart failure and given the widespread cerebral circulation emboli. Dr. Boyer stated, however, that the computerized axial tomography scan did not support this theory and an echocardiogram two months prior showed no sources of mural thrombi that might have been a source. In a June 25, 2003 attending physician's report, Dr. Boyer stated that appellant's direct cause of death was the cerebrovascular accident and opined that arteriosclerotic heart disease, cerebrovascular disease and cardiovascular disease were contributory causes of death. He further opined that all of the causes of death were related to the process of arteriosclerotic vascular disease.

In a letter dated August 11, 2003, the Office requested that appellant have both Dr. Boyer and Dr. Anderson submit a detailed medical report explaining how the cardiovascular accident resulting in the employee's death was caused, aggravated, accelerated or precipitated by the February 8, 1977 myocardial infarction.

In an August 28, 2003 report, Dr. Anderson opined that the employee's death was probably a result of a "shower" of emboli which could have come from the heart or aorta. She advised, however, that it was difficult to say whether emboli forming or coming from the heart were due to a previous heart attack or to intermittent atrial fibrillation, which could have resulted from the employee's chronic obstructive pulmonary disease due to his smoking history.

In an August 25, 2003 report, Dr. Boyer opined that the February 8, 1977 myocardial infarction caused damage to the employee's heart that in turn led to the cerebral emboli that occurred. He further opined that the employee's other physical conditions may also have contributed to his death as they were integral elements of his myocardial infarction.

The Office obtained a second medical opinion from Dr. Charles V. Mattingly, a Board-certified internist. In a report dated October 22, 2003, he found that the employee's cardiovascular accident could not be attributed to his accepted work-related myocardial infarction.

On October 29, 2003 the Office found a conflict of opinion between Dr. Mattingly, the Office referral physician, and Dr. Boyer, the employee's attending physician, with regard to whether the employee's death could be attributed to his work-related myocardial infarction. The Office referred the medical record, a statement of accepted facts and a series of questions, to Dr. Alan Kravitz, a Board-certified internist specializing in cardiovascular disease, for an impartial medical opinion.

In a November 12, 2003 report, Dr. Boyer advised that the employee had no other damage to his heart. He, thus, opined that the damage from his work-related myocardial infarction had continued to develop into congestive heart failure, which then contributed to the formation of cerebral emboli which had lead to his cardiovascular accident.

In a January 13, 2004 report, Dr. Kravitz noted his review of the medical evidence, including a description of the February 8, 1977 work injury and subsequent medical evidence. He noted that the employee had arrhythmia, chronic obstructive pulmonary disease secondary to smoking, diabetes and cardiomegaly with a left ventricular aneurysm. Dr. Kravitz opined that there was no clear cut evidence that the employee suffered the fatal cardiovascular accident due to cerebral emboli and opined that the cardiovascular accident was due to the diffuse atherosclerotic heart disease. He further opined that the medical evidence did not support that the employee's death was related to his accepted myocardial infarction on February 8, 1977 or that his death was medically connected to his federal employment.

By decision dated February 9, 2004, the Office denied appellant's claim for death benefits, finding the weight of medical evidence accorded to Dr. Kravitz, the impartial medical specialist.

In a letter dated February 8, 2005, appellant's attorney requested reconsideration and resubmitted Dr. Boyer's November 13, 2003 report. The attorney argued that the determinative weight should be given to the employee's treating physicians, Dr. Boyer and Dr. Anderson, as they had treated him and reviewed the actual testing to arrive at their opinions. The attorney argued that Dr. Boyer was in a better position to render an opinion relating the employee's death to the accepted condition.

By decision dated February 28, 2005, the Office denied appellant's reconsideration request, finding that the evidence submitted was insufficient to warrant review of the February 19, 2004 decision.

LEGAL PRECEDENT

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).¹ The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously

¹ 20 C.F.R. § 10.608(a) (1999).

considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.² Section 10.608(b) provides that, when a request for reconsideration is timely, but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.³

ANALYSIS

With her reconsideration request, appellant submitted Dr. Boyer's November 12, 2003 report in which he opined that the acute myocardial infarction in 1977 contributed to chronic heart failure and the formation of cerebral emboli which then caused the employee's cardiovascular accident and death. This report, however, was reviewed in the Office's February 9, 2004 decision. The Board has held that the submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.⁴ Appellant, therefore, failed to submit relevant new and pertinent evidence not previously considered by the Office.

Appellant argued that the employee's attending physicians were in a better position to determine the cause of the employee's death than Dr. Kravitz, the impartial medical specialist, and that the Office did not apply the correct legal standard in denying benefits. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity.⁵ Appellant's contentions have no reasonable color of validity. As noted above, the Office had previously considered the reports of the employee's attending physicians. Under section 8123(a) of the Federal Employees' Compensation Act and Board case precedent, when there is a medical conflict, an impartial specialist will make an examination and the opinion of such specialist will be entitled special weight if sufficiently rationalized and based upon a complete and accurate factual and medical background.⁶ On reconsideration, appellant offered no relevant evidence or argument to support her contention that Dr. Kravitz' opinion was insufficiently rationalized or not based on an accurate background. Regarding appellant's contentions about the legal standard for denying benefits, the Board has long held that a claimant has the burden of proving by the weight of the reliable, probative and substantial evidence that an employee's death is causally related to his or her federal

² 20 C.F.R. § 10.606(b)(1)-(2).

³ 20 C.F.R. § 10.608(b).

⁴ *Edward W. Malaniak*, 51 ECAB 279 (2000).

⁵ *Arlesa Gibbs*, 53 ECAB 204 (2001).

⁶ *Gloria J. Godfrey*, 52 ECAB 486 (2001) (in situations where there are 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 on a proper factual background, must be given special weight).

employment.⁷ Appellant provided no credible argument to establish that an incorrect standard was applied to her claim.

Appellant 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. As appellant did not meet any of the necessary regulatory requirements, she was not entitled to further merit review.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 28, 2005 is affirmed.

Issued: December 9, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

⁷ *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).